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CASE NO. .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ALPHONZ LENGYEL,

Petitioner,

v.

BOARD OF REGENTS OF
NORTHERN KENTUCKY UNIVERSITY, et al,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under the causation test in *Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274, has the employer met its burden of proof if the court finds that an employee who was discharged after engaging in constitutionally protected conduct which was a motivating factor in his discharge, would not have been discharged at that time if he had not engaged in such conduct, but would have been discharged at some future undetermined date based upon his unprotected conduct that occurred before the date of the employee's discharge?

PARTIES TO THE PROCEEDING

The parties to the appeal in the Sixth Circuit Court of Appeals, aside from petitioner and respondent Board of Regents of Northern Kentucky University, were appellees Kenneth Lucas, Elmer Haas, Jr., Henry M. Mann, Gordon Martin, James Poston, Edgar Whipperman, Alex Parker, Jr., John G. Hamburg, Sam Makris, individually and as members of the Board of Regents; and Bill Parsons, Ralph Tesseneer, Roy Wallace, William Rost, Stephen Boyd, Neal Jowaisas, Robert W. Mullen, Verne K. Shelton, Howard Storm, Lois Sutherland, Michael Turney and Rosemary Stauss.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was not designated for publication. The opinion is dated April 23, 1984, in Case No. 81-5729, and is set forth verbatim in Appendix A hereto. The memorandum opinion of the District Court below in Case No. 77-50, filed June 9, 1981, granting defendants' motion for summary judgment as to plaintiff's procedural due process claim and overruling defendants' motion for summary judgment as to plaintiff's first amendment claim is set forth verbatim in Appendix B hereto. The judgment of the District Court was filed on May 22, 1981. The memorandum opinion of the District Court below overruling plaintiff's motion for a new trial filed on July 9, 1981, is set forth verbatim in Appendix C hereto. The District Court opinions were not published.

GROUNDS FOR JURISDICTION

The judgment of the Court of Appeals was entered on April 23, 1984. On application of petitioner, an order extending time to file petition for writ of certiorari was granted on July 12, 1984, extending the time for filing the petition to and including September 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I, United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment XIV, Section 1, United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. The Nature of the Case and Course of Proceedings Below

This is an action involving the termination of a college professor by Northern Kentucky University (hereinafter referred to as NKU), a state university. Petitioner, Dr. Alphonz Lengyel, asserted in his complaint in the District Court filed on June 15, 1977, that his termination was in violation of his

federally protected rights of freedom of speech and procedural due process. The basis for federal jurisdiction asserted in the complaint was Title 28 U.S.C. Sections 1331 and 1343 (1), (2), (3) and (4). Dr. Lengyel sought equitable relief including reinstatement and compensatory and punitive damages. He appeared *pro se* in the lower court.

Respondents filed a motion for summary judgment which was granted in part and overruled in part. The lower court granted the motion on plaintiff's due process claim and overruled it as to plaintiff's First Amendment claim. The action was tried before the Court without a jury on May 4, 5, 6, 7, 8, 19, 20, 21, 22, 1981. At the close of plaintiff's proof in the court below, the Court entered judgment for the defendants. The lower court ruled that although the plaintiff's constitutionally protected conduct was the immediate precipitating factor behind his termination, NKU would ultimately have terminated him for other reasons.

Plaintiff filed a notice of appeal on August 13, 1981. The Sixth Circuit decided and filed its per curiam opinion on April 23, 1984. The decision of the Sixth Circuit is set forth in Appendix A hereto.

II. The Facts

Dr. Lengyel was born in Hungary, but moved to the United States in 1956 after suffering at the hands of that country's Communist regime. He became a U.S. citizen and obtained a degree in Art History from San Jose State College. He later received his doctorate from the Sorbonne. He taught at Wayne State University from 1968 to 1972, at which time he joined the NKU faculty. Dr. Lengyel's field was art history and archaeology, and he was assigned to the Fine Arts Department.

Beginning in September, 1972, Dr. Lengyel received three successive appointments (contracts) covering academic years 1972-73, 1973-74, and 1974-75, with salary raises in the second

and third years. In January, 1974, he was transferred to the Department of Social Sciences. There was considerable, and conflicting, testimony as to the reason for that transfer. Professional disagreements between Lengyel and his department chairman, Dr. Parsons, were shown to be the true reason, although NKU claimed that Lengyel had, on several occasions, been disruptive or abrasive in dealing with other departmental colleagues. Lengyel held strong opinions on several matters pertaining to the make-up and operation of the college's Fine Arts Department. Having been educated in European schools and universities, his perceptions as to the importance of rank among faculty members, as well as his beliefs concerning faculty classroom conduct, differed significantly from those held by some of his colleagues. The Court of Appeals cited an occasion when Lengyel referred to a teacher in the Art Department as a "bum". In context, that remark was both justified and protected First Amendment conduct. The teacher involved had directed obscene comments at female students in his classrooms, and Lengyel had merely reported that fact, in confidence, to his department chairman, Dr. Parsons. The "bum" reference was an off-hand remark made in the context of Lengyel's overall objection to the teacher's classroom conduct. It was Parsons, not Lengyel, who ultimately publicized the remark.

On another occasion, Lengyel brought to Parsons' attention that a degree published in the college catalog was incorrect. Lengyel pointed out that the Bachelor of Fine Arts in Art History degree Parsons was offering was non-existent, i.e. for purposes of graduate work, other universities would not recognize it. Ultimately, Parsons had to concede that Lengyel was correct, though Parsons' professional pride was hurt in the process.

A third incident among those mentioned by the Court of Appeals requires explanation. The Court stated that, "[I]n 1973, Dr. Lengyel had further disagreements with a 'Coordinator for Art' in the department to whom he was assigned to report." That statement does not accurately describe the

matter since Lengyel had no dispute with Mr. Jowaisas, the teacher occupying the position. Because Jowaisas held the rank of instructor in studio art, while Lengyel's field was art history and archaeology, a wholly separate discipline, Lengyel suggested to Parsons that he (Lengyel) report directly to Parsons rather than Jowaisas. Parsons, at first resisted the suggestion, believing that other members of the department would feel he was showing partiality to Lengyel. He, nevertheless, ultimately accepted Lengyel's suggestion. The dispute, if it can be characterized as such, was never between Lengyel and the coordinator.

These and other matters essentially involving professional disagreements between Parsons and Lengyel prompted Lengyel's transfer to the Social Sciences Department headed by Dr. Lew Wallace. Lengyel remained in the Social Sciences Department from January, 1974 until just before his termination in August, 1975.

Although NKU witnesses, principally Dr. Parsons and college provost Dr. Tesseneer, resurrected examples of Lengyel's past conduct which they characterized as disruptive or which they believed caused conflict or confusion in the Fine Arts Department, they, nevertheless, in April, 1975, issued Lengyel a new contract for the ensuing fiscal year 1975-76, which was a more advantageous agreement than the previous academic year agreement. He was given a substantial salary raise (from $16,500 to 20,000). On May 8, 1975, in addition to his salary increase, Dr. Tesseneer recommended that the three thousand dollars budgeted for Dr. Lengyel's scheduled summer "dig" (1975) be increased to five thousand five hundred dollars. His budget for summer excavations in 1976 and 1977 was also approved. The following month, Dr. Lengyel received an Americanism Award from the Daughters of the American Revolution, upon Dr. Tesseneer's recommendation.

Respondents will no doubt point out that because of his disagreements with Lengyel, Dr. Parsons had urged Lengyel's non-reappointment in the fall of 1973, in January, 1974, and again in February, 1975. Parsons, however, was never able

to convince Dr. Tesseneer nor Dr. Steely, University President, the persons who ultimately had to approve such action. The fact that despite Parsons' protestations, Lengyel was given a new contract in April, 1975, for the 1975-76 fiscal year, was indicative that Parsons' opinion carried little weight in the ultimate decision to retain or terminate Lengyel. Further proof of this fact is that Parsons, in an affidavit admitted into evidence, stated,

> *"That until approximately August, 1975, this affiant's recommendations that Lengyel be non-renewed were ignored* and this affiant's earlier recommendations obviously had no connection with any claims now by the plaintiff that his rights of free speech were being restricted." (emphasis supplied)

Thus, as will be seen, it was not until Lengyel's actions directly impacted Dr. Steely that action to terminate Lengyel was taken.

In early 1975, having completed the three-year minimum probationary period specified in the Faculty Handbook, Dr. Lengyel applied for tenure. On July 1, 1975, he received notice that his tenure application had been denied. The NKU Board of Regents routinely accepted the recommendation against tenure on August 11, 1975. The district court and the Court of Appeals focused on this fact in weighing the evidence presented by NKU in defense of Lengyel's complaint. Denial of tenure after only three years of employment had very little, if any, significance at NKU. Contrary to the practice at some universities, the denial of tenure did not result in a terminal appointment. Under the policies and procedures then in effect (Faculty Handbook, 1974-75), Dr. Lengyel was free to renew his application for tenure in subsequent years. The Board of Regents later clarified the policy, allowing six years of employment without tenure before automatic termination.

At the end of the 1975 academic year, Dr. Lengyel left the NKU campus and went to North Africa for an archaeological dig, as he had done in previous summers. He returned to NKU

in mid-August. The events which followed, in rapid succession, underlie his First Amendment claim.

Beginning in the spring of 1975, and continuing thereafter, members of the Kentucky legislature received complaints of serious misconduct on the part of NKU President Steely and certain other members of the administration and faculty of the college. At the same time, charges were pending against Dr. Leslie Tihany, who was the university's only distinguished service professor. Those charges had been brought by President Steely. On May 15, 1975, at the request of Tihany's attorney, Dr. Lengyel, a friend and colleague of Dr. Tihany, gave a deposition favorable to Tihany on the charges against the latter. On August 18, 1975, Dr. Lengyel appeared as a witness for Dr. Tihany at his hearing before the NKU Board of Regents. On August 20, 1975, Drs. Lengyel and Tihany testified in Frankfort, Kentucky against the NKU administration before an ad hoc committee of the Kentucky State Senate which was investigating the charges against the Steely administration. On August 21, 1975, the Board of Regents voted to dismiss Dr. Tihany. The same day, Dr. Lengyel received a memo from Dr. Tesseneer advising him that he was being transferred from the Department of Social Sciences back into the Department of Fine Arts. Dr. Wallace, Dr. Lengyel's then department head (Social Sciences Department), was not even consulted. The following day, Dr. Lengyel received two pieces of correspondence from Dr. Parsons. The first was an acknowledgement that Dr. Lengyel had been reassigned to the Fine Arts Department and gave assurances that Lengyel would be treated "with the same consideration and cooperation given to every other member of the Department . . ." The letter ended with the invitation, "You know my office is always open for consultation and help of any kind". Dr. Parsons was the same person who, on January 22, 1975, recommended to Dr. Tesseneer that Dr. Lengyel be placed on a more favorable twelve-month contract effective July 1, 1975, that he receive a fifteen percent salary increase, and that he be given extra travel funds. The second letter, also

dated August 22, 1975, informed Dr. Lengyel that his employment at NKU would be terminated effective August 22, 1976. On the same date, Dr. Parsons delivered to Lengyel two letters from Dr. Tesseneer confirming Lengyel's transfer and simultaneous termination. Following receipt of the notice of termination and consistent with the Faculty Handbook, Dr. Lengyel requested a hearing before Drs. Tesseneer and Parsons and a faculty member of his choosing. That hearing was scheduled for September 8, 1975, but was cancelled by Dr. Tesseneer because Lengyel appeared at the hearing accompanied by two attorneys, and Tesseneer did not wish to proceed with the hearing unrepresented by NKU's attorneys. Dr. Tesseneer never rescheduled the hearing before that committee.

On September 15, 1975, NKU President Steely resigned in the face of mounting pressures as a result of the charges against him which were then being investigated by the NKU Board of Regents.

On September 17, 1975, Dr. Lengyel appealed to the Board of Regents to reinstate him. The Board of Regents did not act on his appeal; in fact, did not even reply. Shortly thereafter, the NKU administration, after conferring with counsel, recognized that in their haste to terminate Dr. Lengyel, they had violated the notice provisions of the Faculty Handbook.[1] Consequently, they decided to give Dr. Lengyel an additional academic year appointment and to issue a revised termination letter. Pursuant to the decision, Dr. Parsons, on October 16, 1976, sent Lengyel an amended non-reappointment letter extending his termination date from August 22, 1976 to June 30, 1977.

Dr. Lengyel's appeals lay dormant until late August, 1976. During that period, Dr. Tesseneer was acting President of NKU until July 1, 1976, when Dr. A. D. Albright became the new NKU President. On August 24, 1976, Dr. Lengyel

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[1] Notice of non-reappointment (termination) required at least twelve months notice before the expiration of the faculty member's current appointment. Lengyel's appointment expired June 30, 1976.

wrote to Dr. Albright concerning his situation and requested the latter's assistance. On September 21, 1976, Dr. Lengyel specifically requested that Dr. Albright review his case with a view to declaring his terminal contract a nullity. In response to those requests, Dr. Albright requested a faculty body known as the Academic Advisory Committee (aka Tenure and Non-Reappointment Review Committee) to review Dr. Lengyel's case. On December 3, 1976, the Academic Advisory Committee submitted its report to Dr. Albright. The Committee expressed "concern about the questionable procedure of issuing a twelve-month contract in April, 1975, followed by a notice of non-reappointment in August, 1975." Responding to the suspicious circumstances under which Lengyel was terminated, the Committee wrote that "[F]urther examination of this situation would require an investigation of reasons for the notice of non-reappointment . . ." The Committee concluded that the procedures were sufficiently questionable to warrant the following recommendations:

> "The committee recommends that the decision to re-appoint Dr. Lengyel, issue a terminal contract to him, or issue a contract with tenure should be made by a "faculty body" in the Department of Fine Arts and Communications based on Dr. Lengyel's performance in his position in that department. . . ."

President Albright accepted the committee's recommendation and suggested to the Fine Arts Department that an ad hoc "faculty body" review Dr. Lengyel's case consistent with the Advisory Committee's recommendation. The faculty body was not instructed specifically to address Dr. Lengyel's complaints regarding his First Amendment violations and, as will be shown hereinafter, the faculty body did not consider that subject.

At this juncture, it should be noted that the Faculty Handbook provided standards for notice of non-reappointment and faculty recourse and specifically contained the following requirement:

> "4.a. After formal notification, should question arise as to the *reason* for non-reappointment, the faculty member may request in writing, a hearing before a committee composed of the Vice-President for Academic Affairs, the immediate departmental superior, and a peer of the faculty member's own choosing. . . ." (emphasis supplied)

At this point in time, some fifteen months after his notice of termination, Dr. Lengyel had still not received the "reasons" for that termination. Despite the concerns expressed by the Academic Advisory Committee and its recommendation to the President, and despite President Albright's charge to the faculty body designated to review Lengyel's record, to (1) conduct whatever examination, study and performance review necessary to formulate a recommendation indicated in the above statement from the Academic Advisory Committee, the "faculty body" met once on December 13, 1976, and reported to Dr. Albright,

> "This body recognizes the existence of a notice of termination issued to Dr. Alphonz Lengyel on October 16, 1975, scheduled to take effect June 30, 1977. After due consideration, we find no reason to revoke or modify this condition."

On January 18, 1977, dissatisfied with the faculty body's report, Dr. Albright asked the members by written memo,

> "What were the two or three determinants of the recommendation? or, What was the general basis for the recommendation? or, What kind of criteria were employed?"

Despite this request, the faculty body refused to be more specific than its perfunctory response of December 13. It conspicuously avoided the specific basis of Lengyel's original appeal, i.e. the administration's reaction to his 1975 First Amendment conduct.

On January 28, 1977, at Dr. Lengyel's request, a separate hearing committee, designated pursuant to the Faculty Hand-

book, was convened to consider, among other things, Dr. Lengyel's objections to the faculty body's refusal to adequately review his case; in particular, the questions he raised regarding the events that immediately preceded his discharge and the failure of the faculty body to give any reasons for its determination.

On February 4, 1977, that hearing committee, composed of faculty outside the Fine Arts Department, issued a report highly critical of the faculty body's earlier report. The Committee stated:

> "We, the members of the Hearing Committee, find the reasons given for the non-reappointment of Dr. Alphonz Lengyel to be without substance. We further find the sequence of events leading to the termination of Dr. Alphonz Lengyel's contract to be highly questionable. We recommend that Dr. Alphonz Lengyel be reappointed unless a professionally conducted peer review demonstrates that he does not meet commonly stated professional standards in the areas specified by the faculty body of the Fine Arts Department."

Consistent with that recommendation, Dr. Albright again asked the "faculty body" to make a professional and adequate review of Dr. Lengyel's case. He specifically requested that the report state *how* the recommendation was determined and/or *what* was considered on each of the five points noted by the Academic Advisory Committee. As noted earlier, he did not ask, nor instruct, the faculty body to inquire into the circumstances under which Dr. Lengyel was terminated in 1975. On March 14, the "faculty body" issued a second report, again omitting reasons for their recommendation.

Once again Dr. Albright asked the faculty body to provide reasons, i.e. specific findings on Dr. Lengyel's performance. By a memo dated April 7, 1977, the faculty body refused to comply with Dr. Albright's request. On April 14, 1977, being unable to secure the reasons for the faculty body recommendation, Dr. Albright met personally with the body. After that

meeting, Dr. Albright drafted a memorandum which set forth his understanding of the faculty body's conclusions on Dr. Lengyel's performance in five specified areas. The memorandum was never signed or formally ratified by the faculty body.

Not having received a definitive response to his original appeal, the faculty body review being essentially no more than a general review of Dr. Lengyel's performance and qualifications devoid of any response to the questions raised concerning the precipitating events immediately prior to his termination, Dr. Lengyel appealed to the University Board of Regents.

A hearing was held before the Board on May 23, 1977. Remarkably, the Board announced it would not permit any evidence as to what occurred *before* Dr. Albright took office (7-1-76), and Dr. Lengyel was told he would not be permitted to present evidence of events before that date. At the hearing, the Board sought to exclude all evidence bearing on the reasons for Lengyel's termination, specifically his First Amendment conduct and its impact on his termination. The lower court concluded that Lengyel, through his attorney, did succeed in getting some First Amendment evidence into the record, despite the Board's rulings to the contrary (Memorandum Opinion, filed 6-9-81, Appendix B p 15a). The Board of Regents voted to affirm Dr. Lengyel's termination.

Dr. Lengyel filed his original complaint with the district court on June 14, 1977.

ARGUMENT FOR ALLOWANCE OF THE WRIT

By affirming the lower court's erroneous application of the test laid down by this Court in *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), the Court of Appeals decided a federal question in a manner in conflict with the decision of this Court. Not only has the *Mt. Healthy* test been applied to constitutional questions across the board, but now forms the basis for unfair labor practice determinations in mixed motive cases under the National Labor Relations Act. With its adoption by the Labor Board, the test literally will affect determinations in thousands of cases. Despite its widespread application, as this case demonstrates, the test is still misunderstood by district and appellate judges and should be clarified.

This case represents one man's struggle to vindicate himself and his belief that the U.S. Constitution guarantees freedom from the persecution that caused him to flee Communist rule. In a larger sense, it demonstrates how injustice flows from an incorrect application of a standard for judging constitutional violations. The *Mt. Healthy* test strikes a balance between an employee's constitutional rights and an employer's right to make legitimate business decisions. Because it involved constitutional considerations, this Court explicitly defined the employer's burden of proof. Where a lower court, with circuit court approval, deviates from that test, this Court should exercise its discretion and correct the error. If one circuit misconstrues a test having such widespread application, the ramifications are significant. Because the circuit court reviews unfair labor practice determinations of the Labor Board that error takes on added significance.

I. The District Court Did Not Follow The Test Laid Down in *Mt. Healthy* for Determining Whether Petitioner's Termination Amounted to a Constitutional Violation Justifying Remedial Action

A. The District Court's Decision Amounted To A Prediction That Petitioner Would Have Been Termi-

nated in the Future For Permissible Reasons, Not A Finding Required By *Mt. Healthy* That His Termination On August 22, 1975, Was For A Permissible Reason.

In *Mt. Healthy*, this Court established a test of causation to be used to determine whether there was a constitutional violation justifying remedial action in dual motivation cases involving public employees. Because the test is one of causation, it presupposes that there were both permissible and non-permissible reasons advanced for the adverse action taken by the employer against the employee. Typically, the employee asserts that the employer's action was motivated by the employee's constitutionally protected conduct, while the employer claims there was a legitimate business reason for its action, unrelated to the employee's protected conduct. In order to determine which of the competing reasons was the true reason for the employer's action, *Mt. Healthy* requires a three-step inquiry. Initially, the burden is on the employee "to show that his conduct was constitutionally protected". Next, the employee must prove that his protected conduct was a "substantial" or "motivating" factor in the decision being challenged. Assuming the employee meets his burden in the first two steps, the third step shifts the burden to the employer to show "by a preponderance of the evidence, that it would have reached the same decision . . . even in the absence of the protected conduct".

In this case, the District Court correctly applied the first two steps of the test, finding that the petitioner engaged in protected conduct which clearly played a role in the decision to terminate him (Memorandum Opinion, Appendix C p. 33a; district judge's explanatory remarks, Appendix D p. 42a).[2]

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[2] For the purposes of defendants' Rule 41 Motion, the district court found that plaintiff engaged in protected First Amendment conduct and that his non-renewal was "based upon a non-permissible reason. The final factor, the motivating factor was this testimony".

The Court erred, however, in finding that NKU had met its burden under the third step of the test. To escape liability for its actions, the employer must prove that *when* it terminated the employee, it not only had permissible reasons to do so, but that it *acted* upon those reasons. In *Mt. Healthy*, this Court noted an important distinction between what an employer legally *could* do and what it did do, regarding an employee's conduct (p. 285). The existence of valid reasons to support the employer's decision is not enough—proving "that the same decision would have been justified . . . . is not the same as proving that the same decision would have been made". *Ayers* v. *Western Line Consolidated School District*, 555 F. 2nd 1309, 1315 (5th Cir. 1977) vac. on other grounds sub. nom., *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979).

Hoping to avoid application of the *Mt. Healthy* test altogether, NKU attempted to prove that a decision to terminate Lengyel had already been made in May, 1975, to be implemented upon Lengyel's return to campus following the summer recess. By taking that tack, NKU sought to prove that the protected conduct played no role in the decision to terminate Lengyel on August 22, 1975. The district court did not, however, credit that testimony. The Court did not find that the decision to terminate Lengyel had been made prior to the occurrence of his protected conduct, nor did it find that when Lengyel was given his notice of nonreappointment on August 22, 1975, that NKU did so for a permissible reason. What it found was that there existed permissible reasons and that NKU would have acted upon them at some future date. That, we believe, is an erroneous construction of the *Mt. Healthy* test. The lower court's memorandum opinion overruling plaintiff's motion for a new trial, and explaining the basis of the court's judgment, demonstrates the court's error. The court stated on page 4 of the opinion:

"Several of the plaintiff's arguments seem to turn on the

idea that he can win this lawsuit if he can disprove defendants' story about their May, 1975 decision to terminate him, or show that his testimony at the Tihany hearing and in Frankfort, was the immediate precipitating factor behind the August 22, 1975 non-reappointment letter. However, this is not the case. The documentary evidence proves that an unfavorable decision on Dr. Lengyel's tenure application was made in July, 1975, before the constitutionally protected conduct at issue.[3] If Dr. Lengyel had not testified against the NKU administration in August, 1975, he might not have received a termination notice that month. However, after considering the testimony and documentary evidence this Court is convinced that NKU would not have reappointed Dr. Lengyel for the 1977-78 academic year, in any event. It is clear that too many of the decision makers at NKU had decided that the negative effects of Dr. Lengyel's disputes with other faculty members outweighed the benefits of his undeniable energy and admirable scholarly accomplishments." (Appendix C, p. 36a).

On page 5 of the opinon, the Court reiterated its conclusions,

> "And as pointed out, *supra*, the evidence indicates that the decision not to rehire Dr. Lengyel would have been reached in any event, before the 1977-78 academic year, because of the ill will between him and several of his colleagues, especially Dr. Parsons." (Appendix C, p. 37a).

Contrary to the requirements of *Mt. Healthy*, the lower court did not find that when NKU terminated Lengyel in August, 1975, it did so for a permissible reason. Instead, it made a *prospective* judgment based on the evidence that "if Dr. Lengyel had not testified against the NKU adminis-

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[3] For the reasons set forth in the Statement of the Case, page 6, the unfavorable tenure decision in July, 1975, was not a predicate to termination.

tration in August, 1975, he might not have received a termination notice that month, ..." but that "the decision not to rehire Dr. Lengyel would have been reached in any event, before the 1977-78 academic year. . . . ." Construing those remarks most favorably to respondents, at most what the Court found was that NKU had sufficient permissible reasons to terminate Lengyel as of August, 1975, and that before June 30, 1976[4] it would have acted upon those reasons. Apparently, the lower court construed this Court's use of the word "would" in the *Mt. Healthy* test as having prospective application, i.e. if the court concludes that the employer would have made the same decision in the future, the employer has met his burden. That, we submit, is not what this Court intended in fashioning a causation test.

First, when viewed in the context of the facts in *Mt. Healthy*, the Court's intent is perfectly clear. In that case, Doyle's last protected conduct occurred in February, 1971. A month later, when the superintendent made his customary annual recommendations to the school board, he recommended that Doyle not be rehired. He offered both permissible and non-permissible reasons for Doyle's termination. In fashioning its causation test in that context, and remanding the case, it is clear the Court intended that the employer prove that *when* it took the adverse action, it did so for a permissible reason.

Second, the purpose of a test of causation in a dual motivation context is to determine *which* of two asserted reasons precipitated the adverse employer action. When the adverse action occurred, it was either the result of a permissible reason or a non-permissible one. Using the *Mt. Healthy* formula, the Court must make a choice as to which reason motivated

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[4] Judge Siler found that Lengyel would not have been reappointed for the 1977-78 year. Under the faculty handbook, that would require notice of non-renewal twelve months before his 1976-77 contract expired (June 30, 1977).

the employer to act, when he did. To speculate as to what the employer may have done in the future based on permissible reasons, but for the occurrence of protected employee conduct in the present, which the employer chose to act upon, is to avoid the causation determination the rule mandates. As this Court noted in *NLRB* v. *Transportation Management Corp.*, 103 S.Ct. 2469, 2475 (1983), in approving the Labor Board's *Wright Line* decision[5]:

> "The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing."

That rationale applies with equal force to the constitutional violation involved here. By terminating Lengyel when it did, NKU knowingly created the risk that its legal and illegal motives could not be separated. Although the lower court found that Lengyel would ultimately have been terminated for permissible reasons, it failed to make the critical determination required by *Mt. Healthy*, that NKU acted for permissible reasons when it terminated Lengyel on August 22, 1975. It failed to separate, as of the date of the adverse employer action, the legal from the illegal reason. As a result, NKU was required to meet a much less stringent burden of proof than envisioned by this Court in fashioning the *Mt. Healthy* test.

In *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), decided the same day as *Mt. Healthy*, this Court further explicated the parameters of the *Mt. Healthy* test. That the Court intended to require a choice between the permissible and non-permissible

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[5] In *Wright Line*, 251 NLRB 1083 (1980), the NLRB adopted the *Mt. Healthy* causation test for determining violations under Section 8(a)(3) of the NLRA.

reasons offered for the employer's action, *as of the date the action was taken,* is clear from the Court's statements in that case. Invoking the *Mt. Healthy* test, this Court stated:

> "Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village a burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." (429 U.S., at 270-271, fn. 21)

Requiring the Village to show that the "same decision would have resulted" requires a present showing that the permissible reason caused the questioned decision. The Labor Board in its *Wright Line* decision, approved by this Court in *NLRB* v. *Transportation Management Corp., supra,* adopted the *Mt. Healthy* test for determining violations of the NLRA in dual motive cases. In so doing, the Board discussed, at length, how the test was to be applied, stating that it, "require(s) proof of how the employer would have acted in the absence of a protected activity . . . ." and that "the burden shifts to the employer to demonstrate that the decision would have been the same in the absence of protected activity". Those statements clearly focus on the present, i.e. what *caused* the employer's decision at the time he made it.

Permitting prospective application of the *Mt. Healthy* test has the effect of placing the employee in a "worse position than if he had not engaged in the (proteced) conduct". In this case, Lengyel, as of April 30, 1975, was reappointed for the 1975-76 academic year. He received, in addition, a thirty-five hundred dollar salary increase, money for an archaeological "dig" for the summer of 1975 and approval of a budget allowance for similar "digs" for the summers of 1976 and 1977. The latter allocations were approved on May 8, 1975. Shortly thereafter, Lengyel left the campus for the summer and returned in August, 1975. Despite testimony from NKU

officials that in May, 1975, the decision to terminate Lengyel was made, to be implemented upon his return to the campus (testimony not credited by the lower court), the fact remains that Lengyel was given a new contract for the ensuing academic year. A logical inference is that his past performance was considered, including the negative conduct NKU attributed to him, in awarding him that contract. Having been given that contract, barring some intervening permissible reason justifying immediate dismissal (none was proven), Lengyel was entitled to teach the 1975-76 academic year *and* have his performance in that year factored into his next annual review which would have occurred in the normal course in the spring of 1976. Instead, immediately following his protected conduct in August, 1975, he was notified of his termination. That action by NKU, occurring as it did before the 1975-76 academic year began, effectively precluded consideration of his teaching performance and other scholarly accomplishments in that year in the overall evaluation of his record that would have occurred in 1976, had he not been terminated. That result, we submit, derives from the lower court's prospective application of the employer's burden under *Mt. Healthy*. In essence, the Court ruled that notwithstanding that a non-permissible reason precipitated Lengyel's discharge in August, 1975, he would have been terminated in any event before June 30, 1976, following the annual review that would have preceded consideration of his employment for the 1976-77 academic year. If the Court had required NKU to prove, as we believe *Mt. Healthy* instructs, that Lengyel would have been discharged on August 22, 1975, for a permissible reason, the Court would not have had to *speculate* as to what was going to happen to Lengyel in the ensuing year.

Interpreting *Mt. Healthy* as petitioner urges is also consistent with this Court's admonition that a borderline or marginal candidate "ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the

basis of that record". In this case, if NKU had not acted precipitously following Lengyel's protected activity, it could still have evaluated his performance in the spring of 1976, consistent with its customary practice, and notwithstanding his earlier First Amendment conduct, could have terminated him at that time, assuming it had legally permissible reasons.

Finally, even if the matter of Lengyel's employment was coming to a head, as respondents will no doubt argue, and assuming the district court viewed Lengyel's protected conduct as merely the straw that broke the camel's back, such a finding would not satisfy the employer's burden under the causation test. If the evidence shows, as in this case, that the adverse action would not have occurred when it did, but for the protected conduct, then the only way the Court could find for the employer would be to speculate that the same action would ultimately have come to pass. As noted earlier, however, a rule of causation in a dual motive situation requires a determination as to what caused the adverse action taken by the employer. It is not satisfied by a prediction that past conduct will inevitably produce future results. In a footnote in its *Wright Line* decision, *supra,* the Labor Board discussed this very point, stating that,

> "In this regard ,we note that in those instances where, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that 'cause' was the straw that broke the camel's back or a bullet between the eyes, if it was enough to determine events, it is enough to come within the proscription of the Act." (Page 1089, fn. 14)

A finding that protected conduct was the straw that broke the camel's back is tantamount to finding that but for the protected conduct, the adverse employer action would not

have occurred at that time, albeit it may have occurred at some future date.

CONCLUSION

In summary, petitioner believes he has conclusively shown that the District Court's application of the *Mt. Healthy* test in this case was erroneous and that the Court of Appeals erred in upholding that judgment. In *Mt. Healthy* this Court intended to strike a balance that would protect against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights. A construction that tips the scale in favor of the employer by permitting a court to speculate as to what will happen in the future as opposed to what caused the employer's present action, does an injustice to the employee and the Constitution. The balance in *Mt. Healthy* is a delicate one, and any unwarranted tampering with the precise burden placed on the employer destroys that balance. For this reason, petitioner urges that the judgment of the Court of Appeals be vacated and the case remanded for further proceedings.

Respectfully submitted,

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APPENDIX A

NO. 81-5729

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALPHONZ LENGYEL,

Plaintiff-Appellant,

v.

BOARD OF REGENTS OF NORTHERN KENTUCKY UNIVERSITY, ET AL.,

Defendants-Appellees.

On Appeal From The United States District Court For The Eastern District of Kentucky

(Filed April 23, 1984)

Before: CONTIE and WELLFORD, Circuit Judges; PECK, Senior Circuit Judge.

Per Curiam. This case involves a challenge to the legality, and alleged wrongful character, of the non-renewal of appellant Alphonz Lengyel's contract as a teacher on the faculty of Northern Kentucky University (NKU) effective after the school year 1976-77. Appellant, a Hungarian by birth and early education, became a United States citizen some years before his association with NKU. He first joined the NKU faculty as an art historian and archaeologist in 1972 after failing to gain tenure at Wayne State University in Michigan.

Not long after his arrival at NKU, Dr. Lengyel became involved in controversy, calling a teacher in the art department a "bum" and complaining to his department head, William Parsons, about an associate in the Art Department. In December of 1972 he failed to appear for the final examination in an Art Survey course. In 1973, Dr. Lengyel had further disagreement with a "Coordinator for Art" in the department to whom he was assigned to report. He also had a dispute with Dr. Parsons about the type of degree that should be bestowed by the Art Department and what should be included in a new Fine Arts building. Appellant was, nevertheless, reappointed for successive one year terms during the 1973-74 and 1974-75 academic years.

Because of serious conflict between appellant and his department head, and others in the Fine Arts department, the Art Coordinator resigned, and Dr. Lengyel was transferred to the History Department. Dr. Parsons, as a consequence of these disagreements, was recommending termination of Dr. Lengyel. In response appellant threatened Dr. Parsons with student action to support his demand for increased funds for archaeological work, and he circulated in early 1975 a letter to the NKU President, its Board of Regents, the Kentucky Governor, and local news media requesting more funds for his activities, and including what the district judge characterized as an "unflattering reference to Dr. Persons."

As the district judge found and the record reflects, the faculty tenure subcommittee, after consideration of Dr. Lengyel's tenure application, recommended that he not receive tenure; on August 11, 1975, the Regents accepted that recommendation.

It was not until August of 1975 immediately after Dr. Lengyel testified at a public legislative hearing for a teaching colleague (later fired) and against the NKU administration and NKU President Steely, who subsequently resigned in September of 1975, that he received notification that his teaching contract would not be renewed. Because the NKU rules provided for at least twelve months advance notice of termination

or non-renewal, the termination date for his services was established as June, 1977.

Dr. Lengyel requested an administrative hearing in 1975 and appeared at the scheduled hearing with two attorneys. The hearing was postponed in order that NKU's counsel might also be present. He then appealed to the defendant Board of Regents for reinstatement, but no action was then taken. A new NKU president, Dr. Albright, was then asked to review the case in 1976, and the matter was referred to a faculty committee, which recommended that another faculty body pursue the procedures utilized and investigate the reason for non-reappointment. The departmental committee considered the matter, and in December of 1976 reported to President Albright: "After due consideration we find no reason to revoke or modify this condition [the notice of termination]." That body did not specify the reasons for its recommendation, and made no reference to Dr. Lengyel's claim that he was not reappointed due to his exercise of his first amendment rights to criticize the University and its President.

Subsequently, at appellant's request, still another faculty committee was convened, outside the Art Department, to consider Lengyel's objections to the prior actions. This time the third faculty committee expressed its concern about the reasons for non-reappointment, and suggested that a "peer review" group look into his ability to meet "professional standards." This committee made a seven page report after considering a multitude of evidence, voting 8-1 to affirm the non-reappointment in March of 1977.[1]

Dr. Lengyel then appealed to the Board of Regents which conducted a hearing in May of 1977, excluding evidence, however, of conduct before Dr. Albright took office (July, 1976), and the Board voted to confirm the non-reappointment.[2]

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[1] The one vote was not for "re-appointment" but for "terminal reappointment"; whatever the distinction was not otherwise explained.

[2] The district court found, despite the Board's ruling, that Lengyel's

This litigation ensued in which appellant asserted that his due process rights had been violated and that he was discharged for expressing his protected first amendment rights. The district court found "the procedures which were employed in connection with Dr. Lengyel's termination" did not constitute a due process denial. We agree and hold that judgment was appropriate for appellees on this claim. There was no publication by the University of any defamatory material against Dr. Lengyel's interests. As an untenured professor, we conclude that NKU met due process requirements in reaching an administrative decision, supported by the faculty and the Board of Regents, not to reappoint a teacher who had been at least a contributing cause of confusion, conflict and consternation among his department and university administrators at NKU. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Bishop* v. *Wood*, 426 U.S. 341 (1976); *Matthews* v. *Eldridge*, 424 U.S. 319 (1976). The university, as found by the district judge, "substantially" complied with its prescribed procedures, and Dr. Lengyel, in sum, received a full and fair opportunity to be heard.

We cannot conclude that the district court was clearly erroneous in his findings under *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977) standards that Dr. Lengyel's exercise of his free speech perogatives placed him in "no worse a position than if he had not engaged in the [protected] conduct." Jt. App. 77-78, 85; *Mt. Healthy*, 429 U.S. at 287.

There was certainly evidence of a constitutionally permissible reason not to re-appoint appellant. The departmental conflict and abrasiveness of Dr. Lengyel was sufficient. *See Pickering* v. *Board of Education*, 391 U.S. 563 (1968). It

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attorney was able to present some evidence of matters occurring before 1976 at this hearing. There was no vote to support Dr. Lengyel among the Board.

should be noted, however, that the district judge did not reach his decision lightly, because he found appellant to possess "undeniable energy and admirable scholarly accomplishments." We conclude that under *Mt. Healthy* standards the appellees have established that Dr. Lengyel would not have been re appointed regardless of his protected conduct.

Judgment for appellees is accordingly AFFIRMED.

ISSUED AS MANDATE: May 15, 1984

COSTS: NONE

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENUCKY
COVINGTON

CIVIL ACTION NO. 77-50

ALFONZ LENGYEL,

Plaintiff,

v.

BOARD OF REGENTS OF NORTHERN KENTUCKY UNIVERSITY, ET AL.,

Defendants.

MEMORANDUM

(Filed June 9, 1981)

This is an action by a college professor who was not reappointed to his teaching position at Northern Kentucky University (formerly Northern Kentucky State College; hereinafter referred to as NKU). He seeks equitable relief, including reinstatement, as well as compensatory and punitive damages. The plaintiff alleges his non-reappointment was in violation of his federally protected rights of freedom of speech and procedural due process. In his deposition, plaintiff has also referred to alleged discrimination against him because of his foreign birth (he is a native of Hungary) but these allegations will not be considered by the Court as plaintiff has not incorporated them in his complaint.

Although the plaintiff was represented by an attorney when

he began this action, and was accompanied by a different attorney at the pretrial conference, throughout most of this period, he has acted *pro se*.

The plaintiff has a law degree from Miskolcz Law Academy (now part of Budapest University), but he has no formal training in the American legal system, so the Court has taken this into consideration when evaluating his pleadings and memoranda.

All parties to this action have filed waivers of their right to a jury, and a bench trial began on May 4, 1981, at Covington. This Memorandum has been drafted to explain the basis for certain rulings formally set forth in a separate Order filed this even date, and to clarify the issues which remained to be tried.

BACKGROUND OF THE CASE

Dr. Alphonz Lengyel was born in Hungary, but moved to the United States in 1956, after suffering at the hands of that country's Communist regime. He became a U.S. citizen, and obtained degrees in Art History from San Jose State College and the University of Paris. He taught at Wayne State University from 1968 to 1972, at which time he joined the NKU faculty. There is a factual dispute concerning the circumstances under which he left Wayne State University. The defendants contend that Wayne State University officials denied Dr. Lengyel tenure because they found his publications inadequate and that he had a great deal of difficulty getting along with his co-workers. Dr. Lengyel contends that he had to leave Wayne State because of budgetary restrictions which meant that the small Art Department at that school could not afford two professors in his area of specialization. For the purpose of ruling on the pending motions, this Court will assume that Dr. Lengyel's version of this dispute is correct.

Soon after he arrived at NKU, Dr. Lengyel became involved in controversy. In September, 1972, when Dr. Lengyel was informed that the NKU ceramics teacher, Neal Jowaisas, used

obscene and blasphemous language while destroying his student's pottery, he complained to the department chairman, Dr. Parsons, referring to Mr. Jowaisas as a "bum." On December 11 of that year, Dr. Lengyel failed to show up for the final exam in his Art Survey class, provoking complaints by students. In 1973, Dr. Lengyel had a disagreement with Dr. Parsons concerning the appointment of a "Coordinator of Art," for the Fne Arts department. Dr. Lengyel considered it demeaning for a senior professor such as himself to be required to report to another faculty member. The position of "Coordinator of Art" was abolished after the incumbent resigned, allegedly because Dr. Lengyel maligned him and undermined his authority. Dr. Lengyel had yet another dispute with Dr. Parsons concerning whether students who majored in Art History should receive a Bachelor of Fine Arts (B.F.A.) instead of the more common Bachelor of Arts (B.A.) degree. Although Dr. Lengyel's recommendations were eventually followed, he alleges Dr. Parsons developed a grudge against him for speaking out in this matter. Dr. Lengyel also alleges that Dr. Parsons and other members of the department were jealous because he had made many scholarly achievements and had developed an international reputation for excellence as an art historian.

Despite these problems, Dr. Lengyel was reappointed to a NKU teaching position for the 1973-74 and 1974-75 academic years, but was transferred from the Department of Fine Arts (chaired by Dr. Parsons) to the Department of History, Geography and Philosophy. This transfer was referred to by Dr. Parsons as "a temporary arrangement designed to handle a particular situation," *i.e.*, his inability to get along with Dr. Lengyel.

However, Dr. Lengyel continued to have disputes with Dr. Parsons. In February, 1975, the NKU administration offered Dr. Lengyel an amount he considered insufficient to adequately fund his 1975 overseas "dig" program. According to Dr. Parson's statement, on February 9, Dr. Lengyel approached him

concerning the organization of a sit-in demonstration at the office of the NKU President, Dr. Steely, in support of his request for additional funds. Dr. Lengyel admits that on February 19, 1975, he circulated to President Steely, the NKU Board of Regents, the Governor of Kentucky, and the local newspapers, a letter setting forth his case for increased funding. This letter contained an unflattering reference to Dr. Parsons, contrasting his alleged niggardly attitude toward Dr. Lengyel's worthwhile project with his liberal attitude toward funding for the play "Three Penny Opera" by Berthold Brecht, which the plaintiff has referred to in his memoranda as a "demoralizing theatrical which is directed against Law and Order." The wide circulation of Dr. Lengyel's letter, containing what Dr. Parsons perceived as an accusation of anti-American behavior on his part, prompted Dr. Parsons to attempt unsuccessfully to have President Steely dismiss Dr. Lengyel for cause.

While all this was going on, another Hungarian-American NKU faculty member, Dr. Leslie Tohany, was engaged in a highly publicized dispute with the administration over unrelated matters. Dr. Lengyel alleges that in March and April of 1975, unsuccessful attempts were made to intimidate or bribe him into committing perjury against Dr. Tihany.

On April 25, 1975, at the same time as other faculty members, Dr. Lengyel was offered a contract for the upcoming 1975-76 academic year, which he duly accepted on April 30. On June 7, 1975, Dr. Lengyel received an "Americanism" award from the local chapter of the Daughters of the American Revolution.

Since Dr. Lengyel had completed his third year at NKU, in the summer of 1975, his application for tenure was considered by the Tenure Subcommittee of the Faculty Affairs Committee. It recommended on July 1, 1975, that Dr. Lengyel *not* receive tenure. On August 11, 1975, the Board of Regents voted to accept that recommendation.

On August 18, 1975, Dr. Lengyel testified in favor of Dr.

Tihany and against the NKU administration before a hearing of the University's Board of Regents. He was the only non-tenured NKU faculty member to testify for Dr. Tihany. On August 20, 1975, Dr. Lengyel testified with Dr. Tihany against the NKU administration in Frankfort before a hearing of an ad hoc Kentucky Senate subcommittee. In Dr. Lengyel's deposition, he reports that he told the subcommittee of how his desire to help build NKU's academic programs was constantly thwarted by the administration's involvement in "dirty politics."

On August 21, 1975, Dr. Tihany was dismissed from his NKU position. Dr. Lengyel received a letter from Dr. Tesseneer, then the NKU Vice President for Academic Affairs, transferring him from the History department to the Art department, which was under the control of his nemesis, Dr. Parsons. On August 22, Dr. Lengyel received a non-reappointment letter from Dr. Parsons, along with a confirmation letter from Dr. Tesseneer.

Pursuant to the NKU *Faculty Handbook*, Dr. Lengyel then requested a hearing before Dr. Tesseneer, Dr. Parsons and a faculty member to be chosen by Lengyel. When Dr. Lengyel showed up for the hearing on September 8, with his attorneys (Mr. Cobb and Mr. Lotz), Dr. Tesseneer refused to proceed. Dr. Tesseneer indicated he had not known any attorneys would be present, and that if Dr. Lengyel were to be represented by counsel, he was reluctant to proceed without the presence of counsel for the University.

On September 15, Dr. Steely's resignation was made public. An investigation of various allegations against him began by the Board of Regents was then dropped. Dr. Tesseneer became Acting President of NKU. On September 17, Dr. Lengyel, through his attorneys, requested a hearing by the Board of Regents, but no hearing was granted at that time. After conferring with counsel, on September 19, the administration decided that some due process problems could arise from the

manner in which Dr. Lengyel was non-reappointed, so it was determined he should be granted another year at the University.

On October 16, 1975, Dr. Parsons wrote an amendment to the first non-reappointment letter, extending the termination date from August 22, 1976, to June 30, 1977. On November 11, 1975, the Tenure Subcommittee of the Faculty Affairs Committee voted not to reconsider its earlier recommendation of tenure denied for Dr. Lengyel.

Dr. Lengyel admits that after receiving the non-reappointment notice he became very bitter, and devoted class time to criticism of the NKU administration and discussion of his personal situation. On February 26, 1976, Dr. Lengyel, acting as "faculty peer," attended the meeting of a committee reviewing the non-appointment of an NKU music teacher, Dr. Sarakatsannis. This meeting was disrupted when Dr. Lengyel entered into a loud disagreement with the University attorney who was present. Yet another controversy arose on February 27, when two nude drawings were removed from an exhibit on the NKU campus, and Dr. Lengyel was highly vocal in denouncing this action as a violation of academic and artistic freedom. On March 9, 1976, Dr. Parsons wrote a memo to Acting President Tesseneer in which he complained about Dr. Lengyel's continuing disruptive personal attacks and recommended that Dr. Lengyel either be dismissed for cause immediately, or given research duties which would take him away from the northern Kentucky area for the 1976-77 academic year. However, no action was taken at that time.

On April 1, 1976, the University adopted a new, more detailed statement of tenure and non-reappointment policies and procedures.

On July 1, 1976, Dr. Albright took office as the new NKU President, and approximately three months later, Dr. Lengyel requested that the new administration conduct a review of his situation. On October 18, 1976, President Albright requested the Academic Advisory Committee to review Dr.

Lengyel's case. On December 3, 1976, the Academic Advisory Committee issued its report. Although somewhat critical of the procedures used in the Lengyel case, it found there were technically no violations of the procedures in the 1974-75 *Faculty Handbook*. However, it concluded that to avoid any appearance of impropriety, this procedure should be followed:

> The Committee recommends that the decision to reappoint Dr. Lengyel, issue a terminal contract to him, or issue a contract with tenure should be made by a "faculty body" in the Department of Fine Arts and Communications based on Dr. Lengyel's performance in his position in that department. This recommendation is not required according to the present Faculty Handbook; however, it does bring the non-reappointment procedure in line with the AAUP model.

President Albright accepted this recommendation, and suggested to Dr. Parsons that the *ad hoc* "faculty body" be composed of the department's promotion and tenure committee, augmented by the other tenured members of the department. President Albright directed the "faculty body" "to conduct whatever examination, study and performance review necessary to formulate a recommendation." The reasonable import of this language was that President Albright wanted the faculty body to review Dr. Lengyel's then present academic and professional performance and ability, as there was no request to perform any review of the controversies of 1975, and earlier.

On December 13, 1976, the "faculty body" released a very short statement recommending the affirmance of Dr. Lengyel's non-reappointment. This statement contained no specific discussion or conclusions on Dr. Lengyel's abilities or deficiencies as a teacher. On January 6, 1977, Dr. Albright wrote Dr. Lengyel to inform him of his appeal rights. Dr. Lengyel promptly responded that he wished to avail himself of his right to review by a "hearing committee," as provided for in the new *Faculty Handbook*. According to that *Handbook*, the

Department Chairman and Associate Dean were to be two of the three members of the Hearing Committee. However, Dr. Lengyel alleged Dr. Price was biased against him, so at Dr. Lengyel's request, he was replaced by another faculty member, selected by Dr. Lengyel.

On January 28, 1977, the Academic Advisory Committee issued a new recommendation critical of the earlier report issued by the "faculty body" created pursuant to its earlier suggestion. It recommended that Dr. Lengyel be reinstated unless specific reasons for his non-reappointment were provided. Another report of similar import was issued by the separate "hearing committee," which also criticized the faculty body's earlier work and recommended that Dr. Lengyel be reappointed "unless a professionally conducted peer review demonstrates that he does not meet commonly stated professional standards."

After receiving these two critical reports, on February 22, 1977, President Albright sent the Lengyel affair back to the "faculty body" with directions to perform a more careful review, as recommended by the Academis Advisory Committee and the "hearing committee."

The "faculty body" informed Dr. Lengyel it would consider any evidence he chose to offer. It held five meetings during the first part of March, 1977, and issued a seven page report on March 15, 1977. This listed in detail the sources considered by the "faculty body" and gave the result of a secret ballot which was conducted among the nine members of the "faculty body"; in favor of non-reappointment: 8; in favor of a terminal one year reappointment: 1; in favor of reappintment: 0. This report was signed by every member of the "faculty body." It did not list any specific failings or deficiencies of Dr. Lengyel.

On April 1, 1977, President Albright requested the "faculty body" to supplement its report by issuing more specific findings on Dr. Lengyel's performance. The "faculty body" refused to comply, issuing another signed statement on April 7, to the effect that "[w]e consider it both unnecessary and undesirable

to state reasons, either specific or non-specific." On April 14, President Albright had a conference with the "faculty body." After this conference, Dr. Albright drafted a memorandum which set forth his understanding of the "faculty body's" conclusions on Dr. Lengyel's performance in five specified areas. President Albright's memorandum stated:

1. Much of the classroom time was devoted to matters unrelated to the course in which the students were enrolled. Student evaluations give evidence. Berating colleagues was a major focus. The classroom was used as a platform and forum for personalized tirades.
2. Scholarly achievements have beeen misrepresented or exaggerated. Outside sources such as Smithsonian provided evidence.
3. The professor subjected colleagues to unprofessional abuse and treatment.
4. The non-classroom contacts with students was more than satisfactory. [This was the only one of the five areas considered in which Dr. Lengyel's performance was found to be adequate.]
5. Committee service, including that of academic functions, was extremely sparse. Consistently failed to attend committee meetings and took no assignments.

President Albright's memorandum was never signed or formally ratified by the "faculty body." Dr. Lengyel was privately given a copy of this memorandum, but no NKU official made it public.

Dr. Lengyel then requested and was granted an additional review by the NKU Board of Regents. This was held on May 23, 1977. Because of his prior judicial experience, the Regents selected James Poston to preside over the meeting which Dr. Lengyel requested be open to the public. Mr. Poston ruled that since Dr. Lengyel was merely being non-reappointed, not fired or dismissed for cause, he had no right to cross examine witnesses or challenge Board members for im-

partiality. However, Dr. Lengyel was represented by counsel and was granted many other rights which are normally associated with adversarial hearings.

At an early stage of the hearing, the Board voted unanimously that they would not consider against Dr. Lengyel any evidence related to matters which occurred before Dr. Albright took office in the summer of 1976, nor would they allow Dr. Lengyel to introduce evidence of events before that time. The presiding Hearing Officer apparently made every attempt to focus the hearing on the five factors listed in the memorandum prepared by Dr. Albright after his April 14, 1977, conference with the "faculty body." However, Dr. Lengyel's attorney did not abide by his rulings, and successfully introduced earlier material, particularly during his examination of Dr. Parsons.

The Board of Regents voted 9 to 0 with 1 abstension to affirm Dr. Lengyel's non-reappointment. This Lawsuit was filed June 14, 1977.

Dr. Lengyel has been unable to locate other satisfactory permanent employment in his field after his termination by NKU, despite the fact that he has actively searched for a new job with the cooperation of the present NKU President, Dr. Albright, who even enlisted the support of Representative Carl Perkins and Senator Wendell Ford in an attempt to get Dr. Lengyel a position with the federal government.

THE DUE PROCESS CLAIM

One of plaintiff's two fundamental claims is that the procedures involved in his termination constituted a denial of his Fourteenth Amendment right to due process of law. After a careful consideration of the relevant case law, the undisputed documentary evidence, and the transcript of Dr. Lengyel's May 23, 1977, meeting with the Board of Regents, two conclusions have been reached. First, because Dr. Lengyel had no tenure at NKU, and, his dismissal did not deprive him of a liberty interest, he had only a very limited right to due process. Second, in any event, the procedures which were employed in

connection with Dr. Lengyel's termination were not so deficient as to constitute a denial of procedural due process of law. It is appropriate to enter summary judgment for defendants on plaintiff's procedural due process claim.

Unless the plaintiff can demonstrate that defendants' actions deprived him of a "property" interest created by state law or a "liberty" interest recognized by the U.S. Supreme Court's interpretations of the due process clause of the Fourteenth Amendment, he has no procedural due process claim.[1] *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

The potential liberty claim will be considered first. The Supreme Court has indicated that a constitutional liberty interest is implicated where an employee is terminated and at

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[1] In support of his contention that his termination was procedurally improper, Dr. Lengyel has brought to the Court's attention that in some ways the procedure followed with him differed from that followed in the case of Dr. Sarakatsannis, a music instructor who was terminated at approximately the same time. Plaintiff's theory is that if the procedures were not identical, that proves there was a malicious intent to discriminate against him.

There is little merit in this argument. It is true that no "faculty body" was convened for Dr. Sarakatsannis. However, for the reasons discussed in the text, this Court concludes that the creation and operation of the "faculty body" did not constitute a constitutional due process violation. It is also true that Dr. Sarakatsannis received a "terminal contract" after the decision not to rehire him. However, even if it is assumed that Dr. Lengyel should also have received a terminal contract, it is difficult to see how the failure to provide him with one was the cause of any injury, as he did receive plenty of advance notice of the University's intention to terminate him.

Therefore, even if the failure to provide plaintiff a terminal contract were wrong, it would appear to be a classic case of a wrong without injury, because the University could have terminated Dr. Lengyel effective June 30, 1977, even, if he had a terminal contract.

Dr. Lengyel also contends that it was illegal for the University to pay him a salary for the 1976-77 academic year, since he had not signed a terminal contract for that period. Even if this is true, Dr. Lengyel has no standing to complain of the illegality, as he chose to accept the salary which was obviously a benefit to him.

the same time the employer makes public a charge which is false and stigmatizing, thus having a potential adverse impact on his future employment prospects. *Bishop* v. *Wood,* 426 U.S. 341 (1976). Certainly President Albright's memorandum drafted after his conference with the faculty body contained potentially stigmatizing remarks about Dr. Lengyel. However, this cannot serve as the basis for a deprivation of liberty claim, since it is undisputed that these potentially defamatory charges were made public only at Dr. Lengyel's insistence. This is in marked contrast with situations such as that in *Owen* v. *City of Independence,* 445 U.S. 622 (1980), where the employer or his agent releases defamatory information without the consent of the discharged employee.

Dr. Lengyel's position is that the charges against him were all demonstrably false, and the decision to terminate him was a poor one, since he is an outstanding teacher and scholar. For purposes of ruling on this motion, this Court accepts as true Dr. Lengyel's estimate of his professional abilities. However, the Supreme Court has held that falsity of the charges alone is insufficient to make out a deprivation of liberty claim. *Bishop* v. *Wood, supra,* at 349;

> The truth or falsity of the [administration's charges] . . . determines whether or not [the] . . . decision to discharge [plaintiff] . . . was correct or prudent, but neither enhances nor diminishes [his] . . . claim that his constitutionally protected interest in liberty has been impaired. A contrary evaluation of his contention would enable every discharged employee to assert a constitutional claim merely by alleging that his former supervisor made a mistake.

Id. (footnote omitted).

Having determined that no liberty interest is involved, the next step is to decide whether plaintiff had in his job a property interest recognized by state law, and protected by the Fourteenth Amendment. It has been held that in the academic

field, no such property interest attaches unless the instructor involved can demonstrate that he had tenure, either *de jure* or *de facto*. *Board of Regents* v. *Roth, supra; Perry* v. *Sindermann,* 408 U.S. 593 (1972).

It is undisputed that plaintiff never received *de jure* tenure status. Dr. Lengyel's position is that his application for tenure was merely delayed, never finally and formally refused. However, this factual question is immaterial; whether his application was delayed or denied does not matter, as it is clear from the record that he was never formally granted tenure.

Did Dr. Lengyel ever attain a tenure *de facto*? In order to show this, he would have to demonstrate "rules or mutually explicit understandings that support his claim." *Perry* v. *Sindermann, supra* at 601. Dr. Lengyel contends that NKU had no formally established tenure system at that time, and that under the facts as they existed he had a reasonable expectation of continuing employment. However, documentary evidence submitted by Dr. Lengyel himself, when considered in light of the controlling case law, demonstrates the plaintiff's position on this legal question to be inadequate. Page 16 of the 1974-75 *Faculty Handbook* for NKU contains this written statement of tenure policy and procedure:

> **TENURE**
>
> The College regards the granting of tenure as protection of its faculty from arbitrary dismissal, as a means of increasing facultty confidence and stability, and as encouragement of a sense of responsibility and involvement. Before granting tenure, the College requires a period of probation during which time it will evaluate the faculty member's competence, personal qualities, and the capacity for continual growth. The usual probationary period is three years. It is recognized that there may be exceptions, such as a distinguished record of service to another institution.

> Department chairmen usually initiate tenure recommendations. However, the individual faculty member may initiate his own nomination. Recommendations proceed from the chairmen to the Vice President for Academic Affairs, then to the President and the Board of Regents. Official notification of the granting of tenure comes from the President's Office to the faculty member, his department chairman, and the Vice President for Academic Affairs. Should a faculty member not receive tenure when he feels he should he may present his case before the Faculty Affairs Committee of the Faculty Senate, which shall, after investigation make a recommendation to the Vice President for Academic Affairs. (For appropriate procedures, please see the by-laws of the Faculty Affairs Committee of the Faculty Senate.)
>
> Once tenure is granted, service of the faculty member shall be terminated only for extreme cause, except in the case of retirement because of age or under extraordinary circumstances because of the College's demonstrable financial exigencies.

Admittedly, this tenure policy is not as detailed as the one subsequently adopted by the University on April 1, 1976. Nevertheless, it is undeniably sufficient to establish a formal tenure system.

> The entire thrust of formal tenure provisions is to standardize the process of faculty selection and employment security. In other words, formal tenure regulations are designed to avoid the *de facto* tenure problem recognized in *Perry*. Consequently, the existence of a formal code governing the granting of tenure precludes a reasonable expectation of continued employment absent extraordinary circumstances. The vast majority of cases considering claims of *de facto* expectations in the face of established tenure systems reject the idea that any protected interest may be created.

Haimowitz v. *University of Nevada*, 579 F.2d 526, 528 9th

Cir. 1978) (citations omitted) (affirming district court's grant of summary judgment on due process issue while reversing and remanding for trial on first amendment claim).[2]

Dr. Lengyel has a great many complaints about the way NKU's tenure system operated during the period in question. For example, he feels that each academic department of the University should have had a separate tenure committee to pass judgment on its own members, as recommended by the American Association of University Professors. He feels that the University should not have used a secret "quota system." He also criticizes the fact that the "Faculty Board of Review" was known by several different names before it was replaced by the "Academic Advisory Committee" on April 1, 1976. Apparently it was referred to at various times as the "Faculty Board of Review Committee," the "Faculty Affairs Committee," and the "Faculty Affairs Committee, Tenure Subcommittee." He feels that when the committee recommended to deny him tenure on July 1, 1975, it should have recited a list of reasons, also as recommended by the American Association of University Professors. Not having any expertise in academic administration, this Court is not qualified to pass judgment on wheth-

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[2] One peripheral aspect of the *Haimowitz* case is worth discussing at this point because it relates to evidentiary questions of relevance which are sure to be raised at the trial of this case. In that case, an upper-level decision making body (analogous to the Board of Regents in this case) had the final authority to make decisions in faculty termination cases. The defendants argued that in view of this, any evidence of improper bias or retaliatory motive on the part of lower-level employees who only recommended dismissal was not relevant, since they acted only in an advisory capacity. The Ninth Circuit Court of Appeals rejected this argument, holding that "[t]he recommendation of the fellow members of a department will surely be a major, if not determinative, factor in the final employment or tenure decision." *Haimowitz* v. *University of Nevada, supra* at 529. Under this rule, Dr. Lengyel should be allowed to introduce evidence of retaliatory motive on the part of Dr. Parsons, or other NKU employees who recommended his termination, as relevant to his First Amendment claim, discussed *infra*.

er there is merit in any of Dr. Lengyel's criticism's of the NKU tenure system. Fortunately, this Court need not decide the question, because it is not relevant to this case. Whether NKU's tenure system in 1975 was wise or unwise does not matter. The critical point is that the University did have a formal, written tenure system. In such cases, for the reasons articulately set forth in *Haimowitz, supra,* there must be "extraordinary circumstances" before *de facto* tenure can arise.

Dr. Lengyel has not alleged the existence of such "extraordinary circumstances" as would support his contention that he had a *de facto* tenured status. *Cf. Soni* v. *Board of Trustees of University of Tennessee,* 513 F.2d 347 (6th Cir. 1975), *cert. denied,* 426 U.S. 919 (1976), which involved a unique fact situation in which the Court of Appeals held that such extraordinary circumstances existed. In that case, a faculty member who did not qualify for tenure under a restrictive state statute because of his foreign birth was assured by his administration he had the same status as a regularly tenured faculty member. When other plaintiffs in subsequent cases presented *de facto* tenure claims more similar to that in the instant case, the Court of Appeals refused to expand its *Soni* holding. *See Plummer* v. *Board of Regents, Murray State University,* 522 F.2d 716 (6th Cir. 1977) (affirming summary judgment in favor of university).

Since Dr. Lengyel had neither *de jure* nor *de facto* tenure, he was not entitled, by virtue of the U.S. Constitution alone, to a hearing before his non-reappointment. However, the University was still required to follow the procedures it had established. *Burnaman* v. *Bay City Independent School District,* 445 F.Supp. 927 (S.D. Tex. 1978); *Mabey* v. *Reagan,* 376 F.Supp. 216 (N.D. Calif. 1974). Those procedures were set forth on Page 17 of the 1974-75 *Faculty Handbook*:

THE STANDARD FOR NOTICE OF NONREAPPOINTMENT AND FACULTY RECOURSE

Notice to the governing board of nonreappointment, or of intention not to recommend reappointment, should be given in writing in accordance with the following standards:

1. Not later than March 1 of the first academic year of service, if the appointment expires at the end of that year, or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.

2. Not later than January 1 after the first year of service, if the appointment expires at the end of that year.

3. At least twelve months before the expiration of and appointment after two or more years in the institution.

4. Beyond these general policies which are designed to include most exigencies, the following statements are in order:

a. After formal notification, should questions arise as to the reason for nonreappointment, the faculty member may request in writing a hearing before a committee composed of the Vice President for Academic Affairs, his immediate departmental superior, and a peer of the faculty member's own choosing. Such hearings will take place within a period of ten to fourteen days from the presentation of the petition.

b. If for reasons of fitness the faculty member's continued performance of his unexpired contract is challenged, the member may request, in writing, a hearing with the same committee as outlined above, along with a representative of the Board of Regents.

c. Finally, the faculty member may request in writing a hearing before the Board of Regents. At

this final hearing the faculty member has the right to legal counsel at his own expense if he so desires.

Upon consideration of the undisputed documentary evidence in this case and the transcript of the Board of Regents hearing of May 23, 1977, this Court is of the opinion that these requirements were substantially, if not completely, complied with. Also, the procedures which were followed were sufficient to constitute adequate compliance with the minimal constitutional standards of procedural due process.

Dr. Lengyel's 1975-76 appointment expired on June 30, 1976. As Dr. Lengyel in 1975 had completed more than two years service at NKU, under Rule 3, *supra*, he was entitled to notice of non-reappointment at least twelve months before that date. Therefore, the first non-reappointment notice was defective, as Dr. Lengyel received it on August 22, 1975, a little more than ten months before the expiration of his appointment. Apparently recognizing this procedural deficiency, on October 16, 1975, Dr. Parsons sent Dr. Lengyel an amendment to the first non-reappointment notice. This second letter changed the termination date to June 30, 1977, thus giving Dr. Lengyel twenty-two months notice, far more than the twelve months notice to which he was entitled.

Dr. Lengyel has several complaints concerning this procedure, but after due consideration, this Court finds his grievances to be without substance. Dr. Lengyel would have this Court give no effect to the second termination letter. He argues that since the first letter was legally defective, the attempt to later remedy the defect is also void. Under his theory, in order to terminate him, the University had to formally revoke the letter of August 2, 1975 and subsequently issue a new termination letter making no reference to the first one. This Court is not persuaded that this hypertechnical argument has merit. However, even if Dr. Lengyel is technically correct, he has no legitimate basis for complaint. The letter of October 16, 1975, was adequate to serve its proper

function, which was to inform Dr. Lengyel that after June 30, 1977, the University intended to let him go.

Dr. Lengyel feels that the first and second notices were also improper because they were issued by his department chairman, Dr. Parsons, acting with the approval of the University's Vice President for Academis Affairs, Dr. Tesseneer. He contends that any termination notice should have come from the President of the University or the Board of Regents, who have the ultimate statutory authority over faculty hiring, dismissal and non-reappointment. This complaint is also without significant merit. The *Faculty Handbook* does not specify who must deliver a notice of non-reappointment. In the absence of such a specification, it is reasonable to assume that a faculty member's immediate supervisor would be a proper party to deliver such a notice. In any event, the non-reappointment was eventually ratified by the Board of Regents, as well as Dr. Tesseneer (who became Acting President on Dr. Steely's resignation) and President Albright. In light of this ratification, it is hard to see how Dr. Lengyel has any legitimate complaint concerning this matter. As with the amendment of the defective non-reappintment letter, even if a technical violation was shown to have occurred that technical violation was not the cause in fact of any injury suffered by Dr. Lengyel. *Cf. Carey* v. *Piphus*, 435 U.S. 247 (1978) (plaintiff must show his injury was caused in fact by the procedural due process violation).

Dr. Lengyel also alleges that the University failed to comply with Rule 4(a) by cancelling and failing to reschedule the September 8, 1975, hearing before a three-man committee as specified in the *Faculty Handbok*. However, it is undisputed that the University's representatives refused to proceed with the hearing as originally scheduled because they felt if Dr. Lengyel had his attorneys present, the University should also be represented by its attorney. This was not an unreasonable position for Dr. Parsons and Dr. Tesseneer to take, since they are untrained in legal matters. It is also noted that the plaintiff

has not cited any authority to establish that he had any right to have his attorneys present at this hearing, which was not a trial. In any event, plaintiff has not alleged that he made any subsequent attempt to have this hearing rescheduled at a later date. In the absence of such an allegation, he has not shown that the refusal of Dr. Parsons and Dr. Tesseneer to proceed with the hearing at the scheduled time was the cause of any specific injury he would not have incurred anyway, particularly in light of the hearings Dr. Lengyel later received before other groups.

Dr. Lengyel also feels that the creation and decisions of the "faculty body" were improper and illegal. As outlined in the background of this case above, the "faculty body" was created on an *ad hoc* basis at the recommendation of the Academic Advisory Committee, which was of the opinion that due to the unusual circumstances surrounding Dr. Lengyel's case he should receive preferential treatment, above and beyond the safeguards outlined in the then-applicable *Faculty Handbook*. President Albright accepted their recommendation. If a university administration chooses to give a disgruntled faculty member additional hearings beyond those which are required, there is nothing in the Constitution to prevent it. This Court discerns no illegality in the creation or operation of the "faculty body."

Dr. Lengyel feels that the "faculty body" (and later the Board of Regents) acted illegally in that they "disregarded" the evidence he submitted. Dr. Lengyel asserts that this charge is proven by the fact that they recommended his termination despite what he feels was overwhelming evidence of his outstanding teaching ability, magnificent scholarly achievements, and generally cordial relations with his colleagues. However, it is undisputed that the administration offered *some* evidence to contradict Dr. Lengyel's contentions. It was for the "faculty body" (and later the Board of Regents) to decide which evidence to accept, not this Court. The mere fact that they decided not to accept Dr. Lengyel's evidence

does not prove that they were biased against him, or that they "disregarded" his evidence when making their deliberations. "[T]he administration of the internal affairs of a college and especially the determination of professional competency is a matter peculiarly within the discretion of a college administration." *Chung* v. *Park*, 514 F.2d 382, 385 (3d Cir.) *cert. denied*, 423 U.S. 948 (1975).

Finally, Dr. Lengyel contends that the University violated Rule 4(c) and his due process rights because the hearing he received before the Board of Regents on May 23, 1977, was allegedly inadequate. He alleges that the Board members were biased against him because of past statements he had made. The validity of this argument, which is inextricably intertwined with Dr. Lengyel's First Amendment claim, is discussed in a subsequent section of this Memorandum. *Cf. Miller* v. *Dean*, 430 F.Supp. 26 (D. Neb. 1976), *aff'd*, 552 F.2d 266 (8th Cir. 1977). He also feels that the Board should have granted him certain rights customarily associated with full-blown adversarial proceedings, such as the right to cross examine witnesses. The Board of Regents denied these rights to the plaintiff because it was operating under the theory that no due process hearing is constitutionally required when a nontenured faculty member is not reappointed, instead of being dismissed for cause. This court believes that the Board's theory was correct. However, even if it is assumed that due process required a hearing under the circumstances of Dr. Lengyel's case, an examination of the 140 page transcript of the hearing shows that the procedures followed there were sufficient under the circumstances to comply with minimal due process requirements. Dr. Lengyel was given advance notice of when the hearing would be held. He was represented by an attorney. He was given a written statement of his alleged deficiencies as an instructor. The hearing was recorded and transcribed, and a copy of the transcript furnished Dr. Lengyel. He was allowed to introduce witnesses and documentary evidence in his behalf. The Board did not issue a separate written report

indicating its agreement or disagreement with each of the four separate charges against Dr. Lengyel, but the charges themselves were written and this was sufficient to avoid the problems discussed in *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970). The law is clear that the concept of due process is a flexible one, and a determination of what process is due is made by weighing the competing interests which are involved. *Matthews* v. *Eldridge*, 424 U.S. 319 (1976); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961). The procedures employed here, under all the circumstances were not so deficient as to offend the constitutional concept of fundamental fairness. *Cf. Chung* v. *Park*, *supra* (university could shift burden of proof to the terminated professor); *Miller* v. *Dean*, *supra*.

The propriety of this holding is supported by a recent case *Frumkin* v. *Trustees of Kent State University*, 626 F.2d 19 (6th Cir. 1980). That case dealt with a *tenured* professor who was terminated due to a lack of funds. The Court of Appeals held that he had a right to a due process hearing, but this did not necessarily include the right to let his attorney conduct the direct and cross examination of witnesses. The Court declined "to force the internal academic affairs of Kent State University into an adversary mold resembling a criminal trial." *Id.* at 22.

Furthermore, the validity of this Court's decision on plaintiff's due process claim is not affected by the fact that it is possible the Board of Regents, and the NKU administration (including the "faculty body") may possibly have committed a serious mistake in judgment by terminating a professor of Dr. Lengyel's caliber. This Court is duly impressed by the amount of evidence Dr. Lengyel has sought to present concerning his teaching ability, scholarly achievements, diligence, and ability to get along with his colleagues and students.

However, for the purpose of deciding plaintiff's due process claim, none of this evidence is relevant. In the absence of improper motivation on the part of the decision maker (the

possibility of which is discussed in the next section), a merely unwise or erroneous decision to terminate an employee does not violate any of his federal statutory or constitutional rights. *Chung* v. *Park, supra* at 387. *Accord, Miller* v. *Dean, supra.*

As the Supreme Court has noted:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or illadvised personnel decisions.

Bishop v. *Wood, supra,* at pp. 349-50 (footnote omitted).

THE FREEDOM OF SPEECH CLAIM

Even though plaintiff's procedural due process claim has no merit, for the reasons set forth in the preceeding section, that does not dispose of this case. Dr. Lengyel has alleged that his termination was motivated by a desire to punish him for having exercised his constitutionally protected right of free speech. There is sufficient evidence in the record to make a material factual dispute on this question.

The leading case in this area is *Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274 (1977). In that case, the district court held that if the teacher's exercise of free speech played a "substantial part" in the decision not to reappoint a nontenured instructor, he was entitled to reinstatement with backpay. Dr. Lengyel contends this Court should apply a simi-

lar rule in his case. However, the Supreme Court subsequently held that the district court had not applied the correct standard, and promulgated a new test to be applied in such cases. It is worthwhile to quote the key language from that opinion:

> The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision — even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A corderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.
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> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" — or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct.

Id. at pp. 285-87 (footnote omitted).

In this trial, this Court will follow the procedure recommended by the Supreme Court. Initally, the plaintiff

will be required to show that he engaged in protected speech and that this was a "motivating factor" in the decision to not reappoint him. If he is successful, the defendants will be given an opportunity to demonstrate that plaintiff would not have been rehired even if he had not engaged in the protected conduct.

To summarize, the Court has concluded that it is appropriate to grant defendant's motion for summary judgment on the due process claim only (this will require a modification of the Magistrate's Order of December 14, 1979, which overruled the motion). However, a trial will still be necessary, as summary judgment is not proper with regard to plaintiff's First Amendment claim. This is in accordance with the procedures followed by other courts in similar situations where terminated untenured instructors have filed claims like those of Dr. Lengyel. *Mt. Healthy* v. *Doyle, supra; Board of Regents* v. *Roth, supra; Perry* v. *Sindermann, supra; Haimowitz* v. *University of Nevada, supra.*

EXPLANATIONS OF OTHER RULINGS

The plaintiff has sought to impose sanctions against the defendants because they failed to answer an interrogatory explaining the legal theories they will argue at trial. This motion will be denied, because a party has a privilege to refuse to disclose his legal theories, as opposed to his version of the facts of a case. *Cf.* Rule 26(b)(3) of the Federal Rules of Civil Procedure (the so-called "work product" exception).

Plaintiff has moved that certain witnesses not be allowed to testify for defendants on the grounds that he anticipates their testimony will be irrelevant or contradicted by an earlier statement they may have made, or for some other reason. This motion will be denied, because none of the reasons cited affect the competency of any of the proposed witnesses. Any specific objections to specific parts of their testimony may be raised and will be ruled upon at the trial.

The defendants have moved to dismiss the Board of Regents of Northern Kentucky University from this action. It is well settled that the Eleventh Amendment is a bar to any claim for money damages against Kentucky's public universities. *Martin* v. *University of Louisville*, 541 F.2d 1171 (6th Cir. 1976). To the extent that Dr. Lengyel seeks to recover compensatory and punitive damages from the Board of Regents as an official body, defendant's motion has merit. However, it is well known that the Eleventh Amendment is not a bar to equitable relief, nor to damages collectible from the Regents as individuals For that reason, the Board of Regents must remain as a collective defendant and as individual defendants, although the motion to dismiss will be granted in part.

The defendants have moved to dismiss the individual defendants and the Board of Regents members as individuals on the basis of qualified immunity. *Wood* v. *Strickland*, 420 U.S. 308 (1975). However, Dr. Lengyel has alleged that those persons acted with bad faith. For the purpose of ruling on this motion to dismiss, this claim must be assumed true. *Conley* v. *Gibson*, 355 U.S. 41, 45 (1957). *Cf. Martin* v. *University of Louisville, supra,* in which the Court of Appeals ruled in favor of the individual defendants, but was careful to note there was no allegation of malice or bad faith.

Plaintiff has moved to have certain of defendants' attorneys barred from further proceedings in this case, on the ground that there is a conflict of interest between the defendants and their insurance company. To grant such a motion would require a change in present law, which does not recognize the existence of a conflict of the type alleged by Dr. Lengyel to be a sufficient basis for disqualification of an attorney. Since Dr. Lengyel has not cited any authorities in support of his motion, this Court declines to adopt a new rule of law such as he proposes. This motion will be denied.

THE STATUTE OF LIMITATIONS ISSUE

Although defendants have not yet filed a motion to dismiss this action because of the tolling of the statute of limitations, it

appears from their motion for leave to amend and memorandum filed February 23, 1981, that they intend to raise this as a defense at trial. In the interest of simplifying the issues for trial, it is appropriate to discuss this legal issue at this time.

The defendants contend that in this type of action, a plaintiff should be required to file his complaint within one year from the time he learns he will not be rehired. In a recent northern Kentucky case, Judge Bertelsman, in a soundly reasoned opinion, adopted a similar argument to dismiss an action brought by another non-reappointed teacher. *Hines* v. *Board of Education of Covington*, 492 F.Supp. 469 (E.D. Ky. 1980). However, the facts here are distinguishable from those in *Hines*. In the *Hines* case, it was appropriate to adopt a one year statute of limitations because that is the period adopted by the state of Kentucky for actions sounding in libel and slander. KRS 413.140. Judge Bertelsman ruled that under the facts of Miss Hines' case, including the fact that no First Amendment claim was involved, her suit was analogous to one for defamation. By contrast, Dr. Lengyel's remaining claims do no sound in defamation. Instead, he is alleging that the defendants retaliated against him for exercising his First Amendment rights. Since such a cause of action was unknown at common law, it is more appropriate to adopt for this case the five year Kentucky statute of limitations period for "an action upon a liability created by statute." KRS 413.120(2). *Cf. Mason* v. *Owens-Illinois, Inc.*, 517 F.2d 520 (6th Cir. 1975); *Garner* v. *Stephens*, 460 F.2d 1144 (6th Cir. 1972) (applying the five year statute of limitations to claims of sex or race discrimination).

For this reason, the Court holds that the *Hines* rule is an insufficient defense, under the facts of this case.

This 9 day of June, 1981.

/s/ EUGENE E. SILER, JR., JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL ACTION NO. 77-50

[Filed July 9, 1981]

ALFONZ LENGYEL

PLAINTIFF,

VS

BOARD OF REGENTS OF NORTHERN KENTUCKY UNIVERSITY, ET AL.

DEFENDANTS.

MEMORANDUM

This matter is now before the Court for consideration of plaintiff's motion for a new trial pursuant to Rule 59(a)(2) of the Federal Rules of Civil Procedure. This Court previously entered judgment for the defendants at the close of plaintiff's proof. Although the defendants had not at that time commenced their formal case in chief, they had already introduced a great deal of evidence in support of their position during the course of cross examining plaintiff's witnesses.

As announced from the Bench, the Court found that some constitutionally protected statements by Dr. Lengyel played a role in the initial decision not to rehire him. However, the Court also found that even in the absence of such protected conduct, NKU would have decided not to rehire Dr. Lengyel for the 1977-78 academic year, for constitutionally permissible

reasons, primarily personal disputes with his colleagues, Dr. Persons in particular.

In Dr. Lengyel's motion for a new trial, he offers a number of arguments to support his position that the Court's fact finding was in error. These points have been considered and found insufficient to support the request for a new trial.

The plaintiff contends that since in 1975 his titular department head was Dr. Wallace, Dr. Parson's recommendations that he not be rehired would have been ignored. However, this argument overlooks the fact that the departmental transfer of Dr. Lengyel was for administrative purposes. He continued to teach Art Department courses, and thus was a *de facto* if not *de jure* member of Dr. Parsons' department. For this reason, Dr. Parson's negative evaluation would have been considered by the decision makers.

Dr. Lengyel also asserts that the First Amendment should protect him from any retaliatory actions by Dr. Parsons, since under his version of the facts Dr. Parsons disliked him only because of their professional disagreements. The evidence presented by Dr. Lengyel tended to support his position that his suggestions to and criticisms of Dr. Parsons were motivated by his sincere concern over professional matters. Moreover, authough not possessing any expertise in the academic field of Art History, the Court is convinced that a number of Dr. Lengyel's suggestions were quite meritorious, such as his proposals to alter the curriculum to give Art History students training in marketable skills. Some of his other suggestions, such as providing office space for twelve art historians in a new NKU facility, may not have been so meritorious. However, this is not material. The federal courts were not created to mediate professional disputes between university professors. The critical fact is that Dr. Lengyel's practice of energetic, vociferous and sometimes abrasive advocacy for his sincerely believed-in positions incurred the emnity of many of his colleagues. A few examples will illustrate the point. Dr. Lengyel admitted that after Dr. Parsons made unwise decisions, he

continued to pressure Dr. Parsons to change his mind. Even though Dr. Lengyel's suggestions were often ultimately adopted, his continual lobbying and second-guessing left Dr. Persons with understandable resentment.

On another occasion, Dr. Lengyel became concerned about the academic competence of one of his colleagues, Howard Storm. He felt that Mr. Storm, who is primarily a studio artist, did not have the necessary scholarly background to teach academic, as opposed to studio-type courses. Dr. Lengyel suggested to Parsons and Storm that he should tutor Storm to bring him up to par. Dr. Lengyel may or may not have been justified in his sincere belief that Mr. Storm's academic performance was inadequate. Regardless, it is clear that Mr. Storm was understandably resentful of Dr. Lengyel's suggestion.

On yet another occasion, Dr. Lengyel protested against the use of obscene language in the classroom by another of his colleagues, Neal Jowasis, referring to him as a "bum." While this Court does not want to condone the use of obscene language in the classroom by instructors, it is clear that in referring to Mr. Jowasis as a "bum" Dr. Lengyel aroused his colleague's understandable resentment.

In these and other examples related by the parties at trial, this Court's job is not to decide whose position on the issue was correct. For the purpose of deciding this case, it is sufficient to note that this type of personality conflict, which can reduce the working efficiency of a department, is a constitutionally permissible reason for terminating a teacher's employment. *Cf. Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968) (to determine whether a teacher's criticism of his superiors or colleagues is protected by the First Amendment, the Court must "balance . . . the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees").

Some of the plaintiff's remaining arguments are based on apparent misconceptions of the prevailing law. For example, a number of cases have been cited in support of the proposition that a civil rights violation exists and a teacher should prevail if the exercise of First Amendment rights played any part in a decision not to rehire. After the Supreme Court's decision in *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U.S. 274 (1977), this is no longer the law. Even though a constitutional violation has been demonstrated, under the *Doyle* decision there is no right to relief if the school administrators can show they would have decided not to rehire even in the absence of constitutionally protected conduct by the teacher.

Several of the plaintiff's arguments seem to turn on the idea that he can win this lawsuit, if he can disprove defendant's story about their May, 1975, decision to terminate him, or show that his testimony at the Tihany hearing and in Frankfort was the immediate precipitating factor behind the August 22, 1975, non-reappointment letter. However, this is not the case. The documentary evidence proves that an unfavorable decision on Dr. Lengyel's tenure application was made in July, 1975, before the constitutionally protected conduct at issue. If Dr. Lengyel had not testified against the NKU administration in August of 1975, he might not have received a termination notice that month. However, after considering the testimony and documentary evidence, this Court is convinced that NKU would not have reappointed Dr. Lengyel for the 1977-78 academic year, in any event. It is clear that too many of the decision makers at NKU had decided that the negative effects of Dr. Lengyel's disputes with other faculty members outweighed the benefits of his undeniable energy and admirable scholarly accomplishments.

As already noted in this Court's earlier memorandum on the summary judgment question, it is not the task of this Court to decide whether this decision was wise. For better or worse, this was a decision to be made by the administrators and Board of Regents of NKU. However, to clarify the record, it

is noted that the defendants did not introduce substantial support for the April 14, 1977, allegation that Dr. Lengyel had misrepresented his scholarly achievements. This serious charge of academic dishonesty was highly upsetting to Dr. Lengyel. The initial Smithsonian report on one of Dr. Lengyel's grant proposals was negative, but this alone does not adequately substantiate such a sweeping charge. Even those witnesses who had the most acrimonious professional or personal disputes with Dr. Lengyel did not at trial demean his academic accomplishment. It is true that the defendants were denied an opportunity to present their case in chief, at which time they might have presented evidence to support this charge. However, in Mr. Taylor's opening statement for the defendants, he did not indicate any intention or ability to present such evidence. While the evidence shows that Dr. Lengyel, like anyone else, tries to present himself in the best light possible, there is no reason to believe he has wrongfully misrepresented his scholarly achievements.

However, as noted in this Court's earlier memorandum on the summary judgment question, under the circumstances of this case, the falsity of charges against the teacher is insufficient to make out a civil rights claim, under the circumstances of this case. And as pointed out *supra* the evidence indicates that the decision not to rehire Dr. Lengyel would have been reached in any event, before the 1977-78 academic year, because of the ill will between him and several of his colleagues, especially Dr. Parsons.

Dr. Lengyel has raised further objections to the Court's memorandum of June 9, 1981, granting partial summary judgment for the defendants. He alleged that the opinion is dated post-trial but refers to pre-trial matters, and implied that this should support his request for a new trial. However, the Court orally at the time the trial began stated what its rulings would be and the reasons for them. Therefore, neither side was prejudiced by the reduction to writing of the Court's reasons for the decision.

For these reasons, plaintiff's motion for a new trial will be denied by a separate Order entered this even date.

This 9 day of July, 1981.

/s/ EUGENE E. SILER, JR., JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

DOCKET NO. CIVIL 77-50

Covington, Kentucky
May 22, 1981
9:30 A.M.

ALFONZ LENGYEL,

Plaintiff,

v.

BOARD OF REGENTS OF NORTHERN KENTUCKY UNIVERSITY, ET AL,

Defendants.

Addendum to Volume Dated May 22, 1981
BEFORE THE HONORABLE EUGENE E. SILER, JR.

Transcript Ordered by: Hon. Arnold Taylor

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[2] (Proceedings were had)

THE COURT: All right. Let me basically advise the parties that one thing this case is not about – at least as far as I can tell – its not about the qualifications of Dr. Lengyel. And that has never been raised by the defendants, at least up to this point. They have admited that and they have all said that you have good qualifications. There was one statement that you may have exaggerated your qualifications or what you have done, but that really doesn't enter into this case.

The issue of whether Dr. Lengyel is a super patriot is not an issue. Everybody admits it. And I congratulate you on that,

Dr. Lengyel. And you have certainly been through a lot. And that would give rise to sympathy, except the Court can't rule in this case because of sympathy. I cannot be ruled by sympathy either for you or against you, or for the University or against it, or Dr. Tessaneer or Dr. Parsons or any personalities involved. I have to take the case as it is and decide at this point.

Now the issue on a motion to dismiss under Rule 41 of the Federal Rules of Civil Procedure is different from a motion for a directed verdict in a case with a jury, because in this case I have to weigh the evidence at this point and decide whether or not the plaintiff has shown by a preponderance of the evidence the requirements he has, or whether or [3] not the burden has shifted as the plaintiff asserts, or whether the defendants have shown by a preponderance of the evidence under the Doyle case the circumstances that they would not have rehired the plaintiff anyway.

Now the first thing I want to do is to advise you that I don't find any evidence against several of these faculty members to hold them in under any circumstances, not just weighing of the evidence. There is no evidence at all against these. So they should be dismissed to start with as parties. That would be Dr. Wallace, Rose, Mr. Boyd, Mr. Jowaisas, Mr. Mullin, Mr. Shelton, Professor Storm, Professor Sutherland, Mr. Turney and Mrs. Strauss, and all the members of the board in their individual capacity. I don't think there has been any showing of bad faith on their part. So it is dismissed against them in an individual capacity rather than an official capacity.

The Court also has some question about the damages shown, but I think that if the plaintiff would prevail he would be entitled to not only reinstatement but back wages, which I think the Court could order to be determined. But I don't think any other damages at this point would be applicable to the plaintiff except perhaps costs in the case.

But then we get to the issue on the merits, whether the plaintiff has shown by a preponderance of the evidence what

he is required to do; and if the burden is shifted, whether [4] the defendants who are remaining have proven what they are required to prove.

Now there are several things that the Court will cover by written memorandum on the motion for summary judgment, so I will adopt everything that will be in that. So you can be advised of that adoption by reference.

In adition [sic] I think the evidence here shows that there is certain conduct that is protected. The defendants haven't asserted that its not protected. I think the testimony before this ad hoc committee at Frankfort is protected under the First Amendment. The testimony on behalf of Dr. Tihaney is protected. There is some question about certain types of comments in classrooms, but for purposes of this I will consider that that's protected. I am not sure that certain criticisms within the faculty committee is protected under the First Amendment, but I want to consider as if it were for this purpose.

And I have to look at all the exhibits that have been specifically brought to my attention. Some of them I haven't read in full, but I don't think some of them are very relevant. And I haven't also passed on the motions, the objections to the exhibits by the defendants, but for purposes of this motion I will consider as if they were all in.

The evidence here indicates that Dr. Parsons from way back, even though I know the plaintiff disagrees, but by [5] the preponderance of the evidence, Dr. Parsons could not get along with Dr. Lengyel. Whether it had a basis in fact, or whether it was just because Dr. Parsons or Dr. Lengyel were hard to get along with, it is not for me to say. But sometimes two chemistries don't get along, they just clash. And I think that I could probably get along with either one of them.

But it is not what I would do. I can't test this case based on what I would do as president of a university or what I would do as regent or what I would do as department chairman. What I have to do is look to see if there is any constitutional violation.

In the spring before Dr. Lengyel testified, either for Dr. Tihaney or before the subcommittee, at this point, although Dr. Parsons wasn't his department chairman, he didn't, just didn't want anything to do with Dr. Lengyel. Dr. Tessaneer also, even though Dr. Lengyel has denied it and says that it is not true, Dr. Tessaneer at this point in the spring, some date, was also of the opinion that Dr. Lengyel was not to be renewed at this time. It primarily has to do with the clash of personalities. It is not anything to do with anything else. But that didn't really come to a head until August the 22, I believe it was, the day.

DR. LENGYEL: Yeah.

THE COURT: When the notice was sent out. Now that was after Dr. Lengyel had testified in Frankfort. Now [6] Dr. Tessaneer said he didn't know about it, but Mr. Ashley indicated that he had told him on the telephone that he had in fact known about it. And perhaps he has forgotten about it. But I think that the nonrenewal, which occurred in August 1975, I believe that's your date, was in fact based upon a nonpermissible reason. The final factor, the motivating factor was this testimony. But now that wasn't the only factor, it was building up to a head to this point.

But, in fact, this shifted the burden to the University to try to show that even if this was a motivating factor not to rehire, they would have done it anyway. And I believe that even though Dr. Lengyel says that it would not have happened, I think based upon all the evidence here and considering factors such as the two or three of these committees, they all considered this matter. And whether or not these committees considered everything that they should have, all the evidence there indicates that the University would not have rehired Dr. Lengyel anyway.

And so I think it meets the test under Doyle against—or Mount Healthy against Doyle, which is 429 U.S. 274.

Now I know some of these cases that Dr. Lengyel has cited, some of which I have not read but most of which I have read

—and it is a factor to consider that some of these are pre-Doyle cases and therefore some of the language in these are not applicable. But Doyle indicates that even if the [7] constitutionally protected conduct was a substantial factor in the decision at this time not to rehire him, nevertheless if the university or the school would not have rehired the person anyway, why that's the end of the case.

Now the University, as we have said two or three times in this case, has a right not to rehire a person who is not tenured. And I have already decided in the previous memorandum, that you will get as soon as we make the corrections in it, that Dr. Lengyel was not tenured. And based upon that, the Sixth Circuit and Supreme Court have said in many cases that they have a right not to rehire Dr. Lengyel.

And this is not saying that you are not qualified, that if I was the president I wouldn't hire you. That has nothing to do with it. But that is one of the reasons you have a tenured and nontenured distinction, is that the University can just say, "We don't want to rehire this man, and that's the end of it."

And two or three of these— well, one committee for sure said that it would not give him tenure. And maybe that committee is completely erroneous, but nevertheless, that's some evidence in fact that he would not have been renewed.

Now in passing on this I say that I have full sympathy for Dr. Lengyel. I think he is a scholar that is recognized throughout the world. He has a right to First [8] Amendment freedoms, these First Amendment freedoms as stated in the case of Pickering against the Board of Education, which is cited incidentally in Dr. Lengyel's supplimental memorandum. It is 391 U.S. 563. It indicated that where there may be some dispute within the department itself or with one's supervisor, that that's not necessarily— well, is not protected conduct under the First Amendment. There has to be a sense of cooperation. And I am not saying it is Dr. Lengyel's fault, but there was a feeling between Dr. Parsons and Dr. Lengyel that they couldn't get along.

And I know that Dr. Lengyel was under Dr. Wallace for a while, but he came back under the Fine Arts Department. And it was the feeling of Dr. Tessaneer and Dr. Steely at the time, as I understand it, that they just could not get along.

Then you have to take your choice of saying, We are going to keep the department head or we are going to keep the professor. And when that happens, it is up to the university. And they essentially, at least in my way of thinking, would have chosen Dr. Parsons.

So this is the way I see it from a preponderance of the evidence. It is no reflection upon Dr. Lengyel as a person. There has been no slam against him from that standpoint. He has the right, of course, to take this matter on appeal to the Sixth Circuit Court of Appeals. He has done a [9] fine job representing himself. And contrary to what he may say that the doesn't know much American law, it appears that he knows quite a lot about it.

So the motion to dismiss is well taken and the motion to dismiss on behalf of all the defendants is granted under Rule 41. And so let a judgment be entered on behalf of the defendants against the plaintiff in the case.

Now is there anything else to take up?

MR. TAYLOR: Yes, your Honor. If the Court please, would the Court provide that the matter of a motion for attorneys' fees is taken under submission for application by the defendant's attorneys through affidavits?

THE COURT: Yes. We can take that up. This is just a judgment. The issue on attorneys' fees will be submitted on motion later. If you desire to file a motion on that, you may file a motion. And I will let the plaintiff respond and we will decide what to do on that, whether we need another hearing or whether the affidavits are such— But you may file your motion first asserting why you would, why you are entitled to it, and then the Court will consider whether that is to be added as costs to the case. The plaintiff should pay the costs of the case. Whether attorneys fees are to be included as costs will be decided later. If you will file a motion to include

them, then I will consider whether it should be included. If it is, then the Court will [10] proceed further to decide how shall be granted as attorneys' fees and we will pass on it at that point.

MR. TAYLOR: Thank you, your Honor.

THE COURT: Dr. Lengyel, now I think you have done a wonderful job and you are a wonderful person, but as I said, I can't pass on the case out of sympathy.

DR. LENGYEL: One thing is not considered at all.

THE COURT: All right.

DR. LENGYEL: That I asked, I asked outside evaluation. I want peace with him. He left the University, he is not there.

THE COURT: Who is that?

DR. LENGYEL: Dr. Parsons. He is not there, he left.

THE COURT: I know that.

DR. LENGYEL: And now another. He wrote in January to give me 15% raise, and in March he asked to give me another professor— no, another chairmanship. He had no— not so ever, and nobody among them established that they want to really in May to nonreappoint me.

THE COURT: I understand all that. And I considered all that. And I have to make a decision based upon the preponderance of the evidence at this point. And I just felt that Dr. Parsons, even though he is not here now, I have to look back at it as of a time way back in 1975, what would the University have done in '75 assuming that you hadn't [11] testified. And my position is or what I see is that it was coming to an impasse in the University and both of you couldn't stay there. Now admitedly Dr. Parsons left later. But it is my belief that is what the University would have done.

DR. LENGYEL: The University didn't do nothing. He made his affidavit, up to August, early August they just ignore him, which is how come that now acceptable, that what decision they did not make in May, why acceptable when he had proven that up to August he was ignored.

THE COURT: Well, I said that I thought that that was a

substantial factor. But then you fall back on the idea of taking that aside, what would they have done. And it is my belief that the University would not have rehired you anyway. And this tenure committee report seems to back that up. That is all that I can say about it. And this is by a preponderance of the evidence. And you will have a right to take an appeal, Dr. Lengyel.

DR. LENGYEL: But there is a committee between this tenure committee who said the whole steps when they went into this nonreappointment was— was not substantiated. And they recommended me to— to reappoint me And they put me back again into the same cage with those people where they were absolutely biased with me instead of to put in the Wallace—

THE COURT: I understand. The people who work in [12] the department where you would have been may very well have been biased to some degree. But unless they are biased for an impermissible reason, they have a right not to renew your contract. That's all. And so I am very sorry. And I know that you wanted to renew your life or restore your position. And all is not lost because you lose a lawsuit. For every case that it filed here there is a winner and there is a loser. And it is unfortunate in your case, obviously, that you are not on the winning side. But you have a chance to take it on appeal. And if you can convince the Sixth Circuit that error has been committed, then obviously we will have to consider it at a later time.

All right. Mr. Marshal, we will let you recess court until court in course.

(A recess was had.)

• • •

I, Nathan F. Perkins, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

NATHAN F. PERKINS, OFFICIAL COURT REPORTER

Office-Supreme Court, U.S.
FILED
SEP 28 1984
ALEXANDER L. STEVAS
CLERK

(2)

Case No. 84-354

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ALPHONZ LENGYEL,

Petitioner,

v.

BOARD OF REGENTS OF
NORTHERN KENTUCKY UNIVERSITY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Under the causation test in *Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274, has the employer met its burden of proof if the Court finds that a non-tenured teacher who was given a notice of non-renewal after engaging in Constitutionally protected conduct which was a motivating factor in his non-renewal, would have been non-renewed for the next immediate school year, based upon his unprotected conduct that occurred before the date of the teacher's non-renewal?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

I. THE NATURE OF THE CASE AND COURSE OF PROCEEDINGS BELOW.

With one exception, Petitioner's statements are accurate. Petitioner states that the lower Court ruled that "NKU would ultimately have terminated" the Petitioner. The word "ultimately" is not found in the District Court's Opinion, as the District Court specifically found that NKU would have decided not to rehire Petitioner for the next immediate academic year (1977-1978).

II. THE FACTS.

Respondents do not accept the factual description of the Petitioner (hereinafter referred to as "Lengyel");

while many of his assertions may be found in the record in an isolated form, his selection of facts do not fully state the case.

Dr. Lengyel did indeed come to Northern Kentucky University from Wayne State University, where he was not successful in obtaining tenure. During his second and third years of employment at Northern Kentucky University (hereinafter referred to as "NKU"), he did receive salary raises, but they were nothing more than the ordinary raises granted with a general across-the-board increase.

At page 4 of his Petition, Lengyel states that there was considerable, and conflicting, testimony as to the reason for his January, 1974 transfer to the Department of Social Sciences. At page 5 of the Petition, Lengyel attempts to characterize that testimony as essentially involving professional disagreements between Lengyel, and his department Chairman, Dr. Bill Parsons. Even the following limited description of Lengyel's disruptive behavior over the course of time will show that the finding of the District Court, that these were primarily personal disputes with colleagues, is supported by the evidence.

1. At pages 4 and 5 of the Petition, the Petitioner criticizes the Court of Appeals' statements in regard to the Art Coordinator issue. Petitioner's assertions require some elaboration.

The Chairman of the Department of Fine Arts, to whom Lengyel was subordinate, was Dr. Bill Parsons. While Lengyel and Parsons had had some difficulties from the beginning, the first substantial conflict came in the fall of 1973 when Lengyel returned to the campus. Parsons had appointed coordinators for the various disciplines in his

Department so that he would not be besieged by requests from the numerous individual teachers. He appointed the Respondent Jowaisis as the Coordinator of Art. Lengyel objected vigorously, claiming that it was insulting to have to report through Jowaisis and demanding permission to deal directly with Parsons. When Parsons refused to do that, because it would constitute preferential treatment over the other educators, Lengyel went to the President (Steeley) and Academic Vice-President (the Respondent Tesseneer) and persuaded them to request Parsons to deal directly with Lengyel. Lengyel had created such intense turmoil over this issue in the Department that Jowaisis and all the other artists came to Parsons complaining about it, but in an attempt to restore some peace and harmony within the Department, Parsons acquiesed to the request of his superiors to accede to Lengyel's demand. As a result, Jowaisis accused Parsons of treating Lengyel in a preferential fashion and resigned.

Lengyel readily admitted that he kept pursuing Parsons about not reporting through the Art Coordinator and he asserted it was a violation of his First Amendment rights when people complained about his offering "to teach young colleagues to teach properly".

At that point, Parsons was even considering resigning himself; Lengyel had created such turmoil and confusion in the Art Department during the entire fall of 1973 that on October 10, 1973, Parsons prepared a letter of resignation, which he then carried in his pocket for a period of time. He wanted support from the Administration, and he was not getting it.

2. Lengyel went over Parsons' head in attempts to get Art History and Archeology removed from the Fine Arts Department and Parsons complained to Steeley about that.

On many occasions, Lengyel pressed for his programs to be separate from studio art, programs to be under his personal direction, all of which was obviously designed to create a small, separate fiefdom for Lengyel.

3. On page 4 of the Petition, Petitioner characterizes the "incorrect degree" issue as merely being a blow to Parsons' professional pride. However, the issue was never that. After Lengyel arrived on campus, he contended that the existing Bachelor of Fine Arts program was worthless and that a Bachelor of Arts program was the only appropriate degree to award. Parsons never refused to offer the BA program at the proper time and favorable consideration was being given to that very idea. However, that was not good enough for Lengyel, who began accusing Parsons of obstructing plans for such a degree. This illustrated, as was shown in other testimony, that any time Lengyel's demands were not accepted, he became disruptive about it; he even acknowledged at trial that he told students that Parsons had made an unprofessional mistake in regard to the proper degree.

4. Lengyel further demonstrated his insubordination by his consistent refusal to operate through ordinary channels; for example, difficulties occurred between Parsons and Lengyel as to financial matters, in which Lengyel insisted on going directly to the Business Office instead of dealing with Parsons, despite Parsons' repeated requests.

5. Shortly after his arrival at NKU, Lengyel told Parsons, his Department Chairman, that Parsons was not preparing his courses properly and should better himself.

6. Lengyel made unrealistic demands for space in the planning of the new Fine Arts Building, including space

for twelve art historians and staff. On numerous occasions, Lengyel asserted that Parsons had made mistakes in the design of the building. Dr. Parsons testified that Lengyel's demands were so unrealistic that at one point the architect walked out of the meeting.

He appeared to other faculty members to be unreasonable concerning the design of the newly planned building. He frequently postured himself as being the sole authority on areas such as how to build the Fine Arts Building.

7. Witnesses testified about instances at Departmental meetings in which they felt uncomfortable with Lengyel's actions, involving disruptions of those meetings. Dr. Parsons testified that at Departmental meetings, he would have several items that needed to be discussed, but Lengyel would insist on raising unscheduled issues and would filabuster, refusing to talk about anything else. If Parsons called something excellent, Lengyel would demand to know why he had not called it superb. Lengyel would demand to know why Parsons had not immediately put in effect a program that Lengyel wanted. After Lengyel would go on and on for a period of time, Parsons would try to stop him by reasoning and that would not work; ignoring him did not work; outshouting him did not work.[1]

Business could not be conducted, and meetings would simply break up because all the time would be spent talking about Lengyel's private concerns; Lengyel admitted that it was his tactic to bring constant pressure on Parsons because he felt it his duty to do so. He asserted that only his conscience was the limit of his criticism, and that if

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[1] To which latter statement Dr. Lengyel replied "You never outshout me", a point which had to be conceded by Dr. Parsons.

Parsons did not respond to one proposal, Lengyel would give him another, and another. He was largely successful in this tactic and usually got to teach what he wanted.

* * *

In the opinion of Dr. Tesseneer, the Vice President, things "got out of hand" by the fall of 1973 and spring of 1974.

In the Fall of 1973, Parsons began asking repeatedly that Lengyel be given a notice of non-reappointment. On January 21, 1974, Parsons advised Steeley and Tesseneer that in his opinion Lengyel had acted unethically and unprofessionally, reason enough for dismissal in most institutions; nonetheless, Parsons was willing that he stay but wanted him to be under Parsons' control.

In view of the continued difficulties between Parsons and Lengyel, and in spite of other faculty members' substantiation of Parsons' complaints, President Steeley (who was not sued by Lengyel) decided to have Lengyel transferred to the History Department for immediate supervisory purposes; that transfer was for one purpose only, to separate Parsons and Lengyel. When Steeley discussed the idea with the Respondent Wallace, the then Chairman of the History Department, Wallace was concerned about the tenure status of the people already in his department. At his request, Steeley and Lengyel went to a meeting of some or all the history faculty members and advised them that Dr. Lengyel was *not* to be part of the History Department for purposes of tenure and promotion. The understanding and the agreement at the time of the transfer was that for purposes of class scheduling and physical location of classrooms and offices, Lengyel would remain in the area of the Fine Arts Department. The transfer was effected, but unfortunately did not work.

It is not surprising that Lengyel does not believe Steeley, Tesseneer and Parsons when they say it was concluded in early May, 1975, that he should be non-renewed, as it does not correspond with his present view of reality. He contends that the change of his contract to a twelve month basis, which he depicts at page 5 of the Petition as a substantial salary raise, and an increase in budget for the 1975 summer dig, proves that Lengyel was well loved by all at that period of time. Nothing could be further from the truth.

The contract status was changed from nine months to twelve months in order to provide income to Lengyel for the summer during the 1975 dig. His preceding year's contract had been for the academic year and the new contract was for the fiscal year with a salary somewhat higher in order to compensate for the summer work, the difference being $3,500. Parsons answers his contentions that he was granted huge amounts of money as a result for his good service by pointing out that his salary was only increased 5.5% and by 15% for being transferred from an academic year to a fiscal year contract.

Dr. Steeley testified that after Lengyel's transfer to the History Department, Parsons and Lengyel continued to have difficulties; by February 19, 1975, Lengyel was claiming that Parsons was refusing to provide the money Lengyel wanted for the 1975 summer dig. Dr. Parsons responded to that charge by letter of February 26, 1975, which made it clear to Steeley that the situation between Parsons and Lengyel had become even worse. Documentary evidence dated February 26, 1975, clearly shows that Dr. Parsons was again demanding Lengyel's non-renewal and that Parsons was justifiably outraged at the accusation by Lengyel that he had spent more money on a play by an East German communist than for Lengyel's arch-

ological projects, which was not true. Steeley considered this an attack on Parsons by innuendo, and felt Lengyel's berating of his Chairman and other department members was unprofessional. Steeley concluded that the transfer to the History Department was not being successful; about this same time, Parsons tried to resign his Chairmanship because of those continuing difficulties with Lengyel, but Steeley and Tesseneer persuaded him not to do so.

Dr. Steeley became very frustrated about the 1975 summer dig funding episode, and his attitude toward Lengyel changed. After he had personally negotiated Lengyel's demands of $8,970 down to $5,000, he turned the matter over to Dr. Tesseneer to finalize the paperwork; when Tesseneer reported back to Steeley, Steeley found that Lengyel had insisted on $5,500, to which Tesseneer had agreed. (As Dr. Wallace stated in a memorandum introduced into evidence, Lengyel regularly gave different versions of his budget to different persons.) He authorized Tesseneer to grant that amount of money but he had become so exasperated with Lengyel and his continual efforts to achieve his own ends that he told Parsons and Tesseneer that he was bowing out of the situation and would defer to the judgment of the Department. He decided that if non-renewal was the desire of the Department, he was not going to oppose that desire anymore.

It was around May 8, 1975, that Tesseneer and Parsons met with Steeley, at which time Steeley told them that he would no longer prevent them from giving Lengyel a notice of non-reappointment. The three of them discussed putting Lengyel back in the Fine Arts Department when he returned from the summer dig, which would have been late August. They decided that they would not issue the non-renewal notice immediately for

two reasons: first, Lengyel had requested the tenure committee to reconsider his case so his tenure application was still pending and they did not think it proper to give a notice at that time; second, they felt that Lengyel would create turmoil even in Europe.

We referred above to Lengyel's *present* view of reality not allowing him to accept NKU's explanation; his view of reality on February 19, 1975, was quite different. On that date, he wrote Steeley a letter, which was admitted into evidence, complaining about Parsons' funding of a "demoralizing" play by a communist, and asking that Steeley take immediate action to support Lengyel, concluding his letter:

> "I trust that your sound judgment will, *as it has in the past,* prevail over the short-sighted views of your subordinates." (Emphasis added.)

Tesseneer had already made up his mind that Lengyel should be non-renewed. In early May, 1975 he and Lengyel met, and the meeting consisted (as Lengyel put it) of a loud conversation. Tesseneer described the final days as follows. He said he just did not want to accept the fact that Parsons was having problems with Lengyel. Even though Parsons had given up, Tesseneer had not. However, Parsons was not making the progress they wanted in the Department, and Tesseneer thought it might be Parsons' fault. He went to Lengyel's office where Lengyel went through a tirade for an hour and a half, while Tesseneer tried to explain that everything could not be Lengyel's way in the Department. Dr. Parsons was invited in and Lengyel became even more incensed. It became apparent to Tesseneer that the Department simply could not work with Lengyel.

Lengyel was incensed because Parsons, as Chairman of the Fine Arts Department, was not blindly accepting his demands. Lengyel accused Parsons of ignorance and of ignoring his requests. The Respondent Storm described his major recollection of Lengyel as being five or six years of constant complaints. All of these events occurred prior to Lengyel's testimony in the Tihany matter on the 15th of May, 1975.

Lengyel's tenure application was in fact denied on July 1, 1975, and his earlier tenure hearing is another illustration of his general pattern of conduct. The Respondent Corbin served on the Faculty Board of Review, designed to give a peer review in the event that a Chairman and teacher disagreed over a tenure application. In the spring of 1975, Lengyel had instituted his own tenure application and had requested a hearing before the committee. Lengyel attended only one meeting prior to his summer departure and it was an utter disaster; the committee was in the process of asking Lengyel some questions connected to the tenure application when he suddenly lost control of himself, became angry and left the room. There had been no exhibition of any animosity toward him by any member of the committee, but Lengyel began saying that it was important that he stay at NKU and that he was an international scholar; he became quite distraught. Nobody asked him to leave, but he simply got up and left. On the first of July, 1975, Dr. Tesseneer was advised of the committee's decision recommending against tenure for Dr. Lengyel. The non-tenure decision was reached because of Lengyel's qualifications. Lengyel conceded that he was angry; he seemed to feel that the committee wanted to await the outcome of his non-reappointment case, but Dr. Corbin did not recall that to be the situation. Corbin advised Lengyel if he had additional documentation that

the committee had not had at the spring meeting, they would be glad to review it and if substantive enough, they could reopen for another meeting. Information was sent by Lengyel, but the committee felt it not to be of such nature as required another meeting.[2]

Lengyel contends that the three man committee was never rescheduled by Tesseneer, but it was not requested until Dr. Albright, the new President, arrived.

At page 8 of his Petition, Lengyel characterizes Steeley's resignation as being "in the face of mounting pressures as a result of charges" supposedly made by Lengyel, but the record does not bear out that conclusion. Moreover, it should be noted that Steeley was never made a party to this lawsuit.

While Lengyel asserts that his appeals lay dormant until late August of 1976, that is because he was awaiting the arrival of the new President, and as soon as Dr. Albright arrived, Lengyel began asking his aid. On August 24, 1976, Lengyel wrote Dr. Albright requesting a change in the decision. Albright wrote Lengyel on September 15, 1976, inquiring of Lengyel as to whether he desired a hearing. Lengyel wrote Albright saying that he would leave it up to Albright as to whether there should be a hearing or not. At that point, Dr. Albright issued instructions to Dr. Corbin to have a hearing. Dr. Albright's instructions to that committee were "to examine all of the case, all of the material, the evidence and so on".

Assertions that Albright was "dissatisfied" with the faculty body's report are conclusions without factual basis.

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[2] On November 11, 1975, Lengyel was advised that the committee had decided to continue in its opinion that tenure not be recommended.

Equally, there is no evidence that the faculty body was "refusing" to be more specific.

When the hearing committee composed of three persons (the one Dr. Tesseneer allegedly refused to continue in view of the presence of the attorneys) was recreated, it turned out that two of the three people on that committee were personally selected by Lengyel and he had no objection to the third party. It was this group that criticized the faculty body report, but even this handpicked group agreed that the *Faculty Body* was supposed to be the group to consider Lengyel s case. Dr. Pinello, the Chairman of the three person committee, readily admitted that his committee was advisory only in nature. He also agreed that the committee had concluded there was no violation of the "letter of the law" and by "letter of the law" the committee meant the Faculty Handbook. Pinello conceded that it was important in a review system that the review be by people who know the faculty member and he came away from the meeting with the impression that Lengyel was not well-liked by his department.

Lengyel implies that reasons for his non-renewal should have been broadcast. However, because of legal principles well known in Academia, and not for fear of the reasons, Dr. Parsons made it clear that he did not want the discussion of the case to be made public unless Lengyel himself made it public, which he finally did at his hearing before the Board of Regents.

ARGUMENT AGAINST ALLOWANCE OF THE WRIT

The decisions of the Courts below are fully in accord with the principles established in *Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed. 2d 471 (1977). Rather, it is the Petitioner who miscontrues *Mt. Healthy,* which is made apparent by an assembly of the various assertions made in the Petition regarding the supposed requirements laid down in that case. The Petitioner erroneously claims that *Mt. Healthy* requires:

1. That not only must both permissible and non-permissible reasons for the termination exist, they must be articulated at the time of termination, and at no later date;
2. That the Court must specifically find that the sole motivation and cause for the employer's action was the permissible reasons; and,
3. That if permissible and non-permissible reasons are intertwined, the employee must prevail.

Analysis of these claims show them to be without foundation.

1. *Mt Healthy* requires that the employer be given an opportunity to demonstrate that the employee would not have been rehired even if he had not engaged in the protected conduct. While the employer must prove this by a preponderance of the evidence, *Mt. Healthy* does not require a finding that reasons for the non-renewal were articulated at the time of the non-renewal.

As a Constitutional matter, reasons do not have to be advanced at all. A non-renewal can be for any reason (so long as it is not Constitutionally impermissible) or no

reason. It is only when the teacher has tenure or he is being terminated "for cause" that he is entitled to a statement of reasons at that time. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 37 L.Ed.2d 548 (1972); *Wells* v. *Board of Regents of Murray State University*, 545 F.2d 15 (6th Cir. 1976). *Mt. Healthy* does not change these rules. Consequently, there was no need for NKU to distinguish between First Amendment and non-First Amendment reasons at the time of non-renewal, or to advance them at all.

Petitioner demands that the context of the *Mt. Healthy* fact situation be considered and it is that very factual background that defeats his claim that the District Court misconstrued *Mt. Healthy*. When Doyle's superintendent made his recommendation he advanced no reasons (contrary to the implication of the Petitioner). When the Board accepted that recommendation, no reasons were being given. It was only later, after Doyle requested a statement of reasons, that any reasons were given. Thus, when the Board adopted the superintendent's recommendation and terminated Doyle, no reasons whatsover had been given. This being the factual context behind *Mt. Healthy* Petitioner's arguments are meritless.

It should be noted that several hearings by several committees were granted Lengyel, during which it was made very apparent what the "reasons" were for his non-renewal. The Board of Regents had Lengyel before it on May 23, 1977, and used those reasons in its decision. Thus, even if reasons are required as asserted by Petitioner, when the final decision by the Board was made, there *were* permissible reasons available.

2. The argument that protected conduct must have played no role is not supportable. In *Mt. Healthy*, the

Supreme Court stressed that an employee should not be able to prevent his employer from reaching a decision not to rehire on the basis of the general record, simply because protected conduct makes the employer more certain of the correctness of its decision. *Mt. Healthy, supra,* at 575. Until Doyle made his telephone call to the local radio station, no action to terminate his employment had been taken, and it was manifestly that action which precipitated his termination, based upon his previous history and the protected speech episodes. It is very apparent what the Supreme Court meant when it refused to preclude the Board ". . . because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct, Doyle's record was such that he would not have been rehired in any event." *Mt. Healthy, supra,* at 575. The footnote from *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation,* 429 U.S. 252 (1977), quoted at page 19 of the Petition, is further authority for a rejection of the sole motivation test being glossed onto *Mt. Healthy* by the Petitioner. In that footnote, the Court stated that proof that the decision was motivated *in part* by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision.

3. *Mt. Healthy* contains no requirement that the employee must prevail if permissible and non-permissible reasons are intertwined. This notion on the Petitioner's part springs solely from the Petitioner's out of context quotation of footnote 14 from *Wright Line, A Division of Wright Line, Inc. and Bernard Lamoureux,* 251 NLRB 1083 (1980).

By accepting his own major premise (that the District

Court "speculated"), the Petitioner is able to create out of whole cloth an issue of potential misapplication of *Mt. Healthy* in labor cases. No such misapplication will occur. There was no speculation on the part of the District Court, and because of the peculiar nature of teacher non-renewal requirements, labor cases are best left to their own facts for application of *Mt. Healthy,* rather than have *Mt. Healthy* construed (for labor law purposes) in an educator's case.

Lengyel's criticism of the District Court in its use of the word "would" is entirely unfounded, that being the very verbiage of the Supreme Court. That verbiage is particularly apposite in teacher non-renewal cases. Commonly, non-tenured teachers are to be given notice by some recognizable date that their contracts are not going to be renewed; this facilitates their seeking other employment at their relative leisure and while the notice might come at the very end of the allowed period, there is no Constitutional prohibition against giving a teacher earlier notice. Contrary to the Petitioner's argument at page 20 of the Petition, a teacher does not have a Constitutional right to a last minute notice so that all of his behavior up to the minute may be considered.

During his contractual period, an untenured teacher can typically be immediately terminated only for specified causes, and even in that regard a teacher and an assembly line operator are not the same. Moreover, they have fundamentally different legal employment relationships, the teacher being hired for a limited, but specific, term and the ordinary worker being hired for a vague, open ended period. Either is subject to termination at the whim (assuming it is a Constitutionally permissible whim) of the employer. However, the factory worker can be dis-

charged immediately, whereas the teacher may well be able to hold his job for nearly another year. Thus, it is not speculation for a Court to consider a teacher's record and conclude that at some point during the non-renewal period the non-renewal would be issued.

CONCLUSION

While the Petitioner claims that a review of this case is required by some supposed misapplication of *Mt. Healthy* principles, what he really seeks is a review of *Mt. Healthy* itself. The Petitioner had more than adequate review of his case by numerous committees, the NKU Board of Regents, the United States District Court and the Sixth Circuit Court of Appeals. To equate his proper defeats with Communist persecution is typical of the self-righteous claims made by Lengyel throughout his time at NKU; in his view, only *his* rights are worthy of protection. But the Respondents also had a right to be free from Lengyel's persecution, and the Courts below properly balanced the parties' respective rights.

Respectfully submitted,

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